No. 95-566-CSY
Status: GRANTED

Title: Montana, Petitioner
v.
James Allen Egelhoff

Docketed:
October 6, 1995

Court: Supreme Court of Montana

Counsel for petitioner: Mazurek,Joseph P.

Counsel for respondent: German,Ann C.

NOTE: See mail label re dkt dt.

Entry	Date	Note	Proceedings and Orders
1	Oct 4 1995	G	Petition for writ of certiorari filed. (Response due November 5, 1995)
2	Nov 6 1995		Brief of respondent James Allen Egelhoff in opposition filed.
3	Nov 6 1995		Brief amici curiae of Delaware, et al. filed.
4	Nov 20 1995		Reply brief of petitioner filed.
6	Nov 21 1995		DISTRIBUTED. December 8, 1995 (Page 2)
8	Dec 8 1995		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 19, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 16, 1996. Rule 29.2 does not apply.
			**********
12	Jan 17 1996	G	Motion of American Alliance for Rights and Responsibilities, et al. for leave to file a brief as amici curiae filed.
9	Jan 18 1996		Joint appendix filed.
10	Jan 18 1996		Brief of petitioner Montana filed.
13	Jan 18 1996		Brief amicus curiae of Criminal Justice Legal Foundation filed.
11	Jan 19 1996		Brief amici curiae of Hawaii, et al. filed.
14	Jan 19 1996		Brief amicus curiae of United States filed.
15	Jan 24 1996		SET FOR ARGUMENT WEDNESDAY, MARCH 20, 1996. (2ND CASE).
16	Jan 30 1996	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	Feb 2 1996		Record filed.
		*	Original record proceedings Supreme Court of Montana (BOX)
18	Feb 6 1996		CIRCULATED.
19	Feb 8 1996		Record filed.
		*	Original record proceedings District Court of Lincoln County, Montana (BOX).
22	Feb 14 1996	X	Brief of respondent James Allen Egelhoff filed.
23	Feb 16 1996	X	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
20	Feb 20 1996		Motion of American Alliance for Rights and Responsibilities, et al. for leave to file a brief as amici curiae GRANTED.
21	Feb 20 1996		Motion of the Solicitor General for leave to participate

No. 95-566-CSY

Entry	Date	Note	Proceedings and Orders
			in oral argument as amicus curiae and for divided argument GRANTED.
24	Mar 12 1996	X	Reply brief of petitioner filed.
25	Mar 20 1996		ARGUED.

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

JAMES ALLEN EGELHOFF,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a defendant deprived of his right to due process under the Fourteenth Amendment to the United States Constitution when a jury is instructed, pursuant to a state statute, that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense?

PARTIES TO THE PROCEEDING

The Petitioner in this Court is the State of Montana.

The Respondent in this Court is James Allen Egelhoff.

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OPINION BELOW

The opinion of the Montana Supreme Court is reported at 900 P.2d 260 (Mont. 1995). (App. 1a-26a.)

JURISDICTION

The state court opinion was filed on July 6, 1995. (App. 1a-26a.) Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law
> . . . .

Mont. Code Ann. § 45-2-203 (1987):

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it

> was an intoxicating substance when he consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition.

Mont. Code Ann. § 45-5-102(1)(a) (1987):

> A person commits the offense of deliberate homicide if: (a) he purposely or knowingly causes the death of another human being . . . .

STATEMENT OF THE CASE

Respondent James Allen Egelhoff was charged by information and convicted by a jury of two counts of deliberate homicide in violation of Mont. Code Ann. § 45-5-102 (1987) in the shooting deaths of Roberta Pavola and John Christianson. To convict on a charge of deliberate homicide, the State must prove as an element of the offense that the defendant acted "knowingly" or "purposely" in causing the death of another human being. (App. 28a, 29a.) Egelhoff was sentenced to 40 years in the Montana State Prison and two years for use of a firearm as to each count, to be served consecutively, for a total of 84 years.

At approximately midnight on July 12, 1992, the bodies of Roberta Pavola and John Christianson were found in the front seat of Christianson's station wagon, and Egelhoff was found in the rear cargo area, alive, intoxicated and yelling obscenities. Each victim died from a single gunshot wound to the head. Pavola had been shot in the left temple area and Christianson was shot in the right back side of his head. Egelhoff's gun was found on the floorboard near the brake pedal on the driver's

side with four loaded rounds and two empty casings. Forensics testing identified gunshot residue on Egelhoff's hands. Egelhoff voluntarily consumed alcoholic beverages on the day of the homicides to the extent that his blood alcohol level measured between .33 and .36 percent.

At trial, Egelhoff presented evidence regarding his intoxication, contending that his level of intoxication precluded him from undertaking the physical tasks necessary to have committed the homicides and asserting that an unidentified fourth person must have committed the crimes. He also claimed that he suffered from an alcohol-induced blackout which prevented him from recalling the events of the night in question.

The district court instructed the jury pursuant to Mont. Code Ann. § 45-2-203 (1987) as follows:

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the Defendant proves that he did not know that it was an intoxicating substance when he consumed the substance causing the condition.

(App. 29a.) Thus, the voluntary intoxication evidence was admissible, as offered, to show Egelhoff's physical inability to commit the crimes and to explain why he could not remember the events surrounding the crimes. However, pursuant to § 45-2-203, the evidence was not admissible on the issue of whether he "knowingly" or "purposely" committed the alleged crimes.

Egelhoff objected to the instruction on federal constitutional grounds at the time of settling jury instructions, arguing that Mont. Code Ann. § 45-2-203 was unconstitutional because it shifted the burden from the State to him with respect to the required mens rea by lowering the required mental state for those persons who are voluntarily intoxicated. (Tr. 1158-59.) Egelhoff made the same argument in his post-trial motion for a new trial.

The district court instructed the jury that the State retained the burden of proof, beyond a reasonable doubt, as to all the elements of the offenses, including the mental state requirement of having acted knowingly or purposely. (App. 30a.) The district court further instructed the jury that the State has the burden of proving guilt of the Defendant beyond a reasonable doubt and that the Defendant is presumed to be innocent of the charges against him. The jury was told that this presumption is not overcome unless, from all the evidence in the case, the jury is convinced beyond a reasonable doubt that the Defendant is guilty. It additionally was told the Defendant is not required to prove his innocence. (App. 27a-28a.)

Egelhoff appealed his conviction to the Montana Supreme Court, claiming that Mont. Code Ann. § 45-2-203 is unconstitutional because it has the effect of negating the requirement that the State prove a mental state which is an essential element of the offense charged, i.e., that the Defendant acted purposely or knowingly. Relying upon federal case law and the Due Process Clause of the Fourteenth Amendment to the United States

Constitution,[1] the Montana court declared § 45-2-203 unconstitutional and reversed the convictions. In doing so, the Montana Supreme Court stated that since the jury was not allowed to consider evidence of voluntary intoxication on the element of mental state, the State's burden of proof beyond a reasonable doubt on that element was reduced, in violation of the Court's ruling in *In re Winship*, 397 U.S. 358, 364 (1970). (App. 10a, 12a, 14a.) The Montana court cited *Chambers v. Mississippi*, 410 U.S. 284 (1973), in stating that, due to § 45-2-203, Egelhoff was denied the right to a fair opportunity to defend against the State's accusations (App. 12a). The state court also relied upon *Martin v. Ohio*, 480 U.S. 228 (1987), for the proposition that a court may not constitutionally disallow admission of evidence of voluntary intoxication during trial and consideration of that evidence by the jury in determining whether Egelhoff possessed the requisite intent. (App. 12a-14a.)

REASONS FOR GRANTING THE WRIT

The petition should be granted because the Montana Supreme Court decided a substantial federal question in conflict with the decisions of the highest courts of several

[1] The Montana court relied exclusively upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution and federal case law interpreting that amendment. At no time in the opinion did the court refer to article II, section 17 of the Montana Constitution, which provides that "[n]o person shall be deprived of life, liberty, or property without due process of law."

other states; because the state court has decided an important question of federal law in a way that conflicts with applicable decisions of this Court; and because the state court has decided an important question of federal law which has not been, but should be, settled by this Court. The reasoning of the Montana Supreme Court not only differs markedly from that in *Winship*, *Chambers*, and *Martin*, the cases on which it relied, but also raises important questions regarding the constitutional power of the state legislature to make certain forms of evidence irrelevant to determining culpability for crimes.

I. The Constitutional Issue Has Been Resolved By Several Other State Courts of Last Resort Contrary to the Decision Below.

The Montana Supreme Court's decision conflicts with, inter alia, the Arizona Supreme Court's opinion in *State v. Ramos*, 648 P.2d 119 (Ariz. 1982). In *Ramos*, the defendant contended that the prosecution was unconstitutionally relieved of proving an element of the crime charged because the jury, under Ariz. Rev. Stat. Ann. § 13-503 (1980),[2] was prohibited from considering his

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[2] Ariz. Rev. Stat. Ann. § 13-503 (1980) disallowed the jury's consideration of voluntary intoxication evidence as to all mental states except "intentional" and provided:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition, but when the actual existence of the culpable mental state of intentionally or with the intent to is a necessary element to constitute any particular species or degree of offense, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the culpable mental state with which he committed the act.

This section was amended, effective January 1994, to disallow the jury's consideration of voluntary intoxication evidence for all mental states, including offenses where the requisite mental state is "intentional." The 1993 amendment provides as follows:

> Temporary intoxication resulting from the voluntary ingestion, consumption, inhalation or injection of alcohol, an illegal substance under 34 of this title or other psychoactive substances or the abuse of prescribed medications does not constitute insanity and is not a defense for any criminal act or requisite state of mind.

intoxication to determine whether he committed the crime "knowingly." The Arizona Supreme Court disagreed, concluding that the statute did not relieve the state of the ultimate burden of persuasion. Relying on *Powell v. Texas*, 392 U.S. 514, 535-36 (1968), the Arizona Court reasoned that the state legislature has wide latitude in promulgating state substantive law and that the United States Constitution reserves to the states considerable freedom in defining crimes, including the mental states involved, and in establishing penalties for the crimes defined. The Arizona Court also noted that relevant evidence may sometimes be excluded for reasons of policy and that public policy dictates that one who voluntarily seeks the influence of alcohol should not be insulated from criminal responsibility. *Accord State v. Gallegos*, 870 P.2d 1097 (Ariz.), *cert. denied*, 115 S. Ct. 330 (1994); *State v. Schurz*, 859 P.2d 156 (Ariz. 1993).

The Montana Supreme Court's decision also conflicts with *Wyant v. State*, 519 A.2d 649 (Del. 1986). In that decision, the Delaware Supreme Court concluded that Del. Code Ann. tit. 11, § 421 (1976)[3] renders irrelevant and inadmissible any testimony regarding the effect of a defendant's intoxication on the issues of intent and proof of the required state of mind for conviction of the charged offenses. The Delaware Supreme Court declared that § 421 is constitutional since it does not deprive the defendant of due process or impermissibly relieve the state of its burden of proof of the defendant's intent to commit the crimes charged. The Delaware Court remarked that the defendant received the process constitutionally due him within the definitions of acceptable social conduct imposed by the will of the people through the legislature. *Accord Davis v. State*, 522 A.2d 342 (Del. 1987).

The decision of the Montana Supreme Court is also in conflict with the Hawaii Supreme Court's decision in *State v. Souza*, 813 P.2d 1384 (1991). In *Souza*, the Hawaii Court held that Haw. Rev. Stat. § 702-230 (1986), which provides that evidence of self-induced intoxication of a defendant is not admissible to negative the state of mind sufficient to establish an element of the offense, is constitutional. The Hawaii Court stated that the statute does not deprive the defendant of the right to present a defense, nor does the statute relieve the state of the

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[3] Del. Code Ann. tit. 11, § 421 (1976) provides:

> The fact that a criminal act was committed while the person committing such act was in a state of intoxication, or was committed because of such intoxication, is no defense to any criminal charge if the intoxication was voluntary.

burden of establishing that a defendant had the requisite mens rea.

The Montana Supreme Court's decision also conflicts with the Missouri Supreme Court's decision in *State v. Erwin*, 848 S.W.2d 476 (Mo. 1993), *cert. denied*, 114 S. Ct. 88 (1994), where the court held that Mo. Rev. Stat. § 562.076 (1983),[4] which provides that the jury may not consider voluntary intoxication on the issue of the defendant's mental state, does not violate due process since the exclusion of voluntary intoxication evidence in no way relieves the state of its burden of proving all elements of the offense, including mental state, beyond a reasonable doubt.

Thus, the highest courts of at least four states have held that a defendant's federal constitutional right to due process is not violated when a jury is precluded from considering evidence of voluntary intoxication in determining whether the defendant possessed the requisite mental state. The Montana decision below, which holds to the contrary, stands alone.

The Montana Supreme Court's opinion further conflicts with the decisions of several highest state courts which have held that it is not a denial of due process to preclude the jury from considering evidence of voluntary intoxication on the issue of the defendant's ability to form

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[4] Mo. Rev. Stat. § 562.076 (1983) provides in relevant part:

> Evidence that a person was in a voluntarily intoxicated or drugged condition may be admissible when otherwise relevant on issues of conduct but in no event shall it be admissible for the purpose of negating a mental state which is an element of the offense.

the requisite mental state when the offense charged requires a general, as opposed to a specific, intent. *People v. DelGuidice*, 606 P.2d 840 (Colo. 1980). *Accord Bieber v. People*, 856 P.2d 811 (Colo. 1993). In sum, the decision of the Montana Supreme Court conflicts with the practice of a vast majority of the states which limit to some degree the use of voluntary intoxication evidence.[5]

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[5] The Montana Court's holding also conflicts with the decisions of lower state courts. In *Pharo v. State*, 783 S.W.2d 64 (Ark. Ct. App. 1990), an Arkansas intermediate court held that the trial court properly refused to admit evidence of voluntary intoxication to negate the existence of a specific element of a crime. Citing *In re Winship*, Pharo argued that the exclusion of such evidence that would tend to negate the specific intent requirement deprived him of due process because the state was effectively relieved of its burden of proving the mental state element beyond a reasonable doubt. The court rejected this argument and stated that the Arkansas Supreme Court opinion in *White v. Arkansas*, 717 S.W.2d 784 (Ark. 1986), effectively held that voluntary intoxication is no longer available as a defense or admissible for the purpose of negating specific intent. *Accord Cox v. State*, 808 S.W.2d 306, 313 (Ark. 1991). In *Commonwealth v. Rumsey*, 454 A.2d 1121 (Pa. Super. Ct. 1983), a Pennsylvania intermediate court held that 18 Pa. Cons. Stat. Ann. § 308 (1976), which provides that evidence of voluntary intoxication may not be introduced to negate the element of intent of the offense except when it is relevant to reduce murder from a higher to a lower degree of murder, is constitutional. The Pennsylvania court stated that § 308, in effect, redefined the mens rea element of intentional or knowing crimes in cases where the defendant was voluntarily intoxicated. This was permissible, the court stated, under *Powell v. Texas*.

II. Contrary to the Decision Below, the Due Process Clause Does Not Restrict a State Legislature's Authority to Render Evidence of Voluntary Intoxication Irrelevant as a Matter of Law in Determining Mental State.

The Montana Supreme Court relied on this Court's decisions in *Winship*, *Chambers*, and *Martin* to declare Mont. Code Ann. § 45-2-203 unconstitutional. On the contrary, the Montana legislature's decision, based on valid policy reasons, to render evidence of voluntary intoxication irrelevant as a matter of law in determining mental state violates no constitutional principles.

Nothing in the Constitution precludes the states from utilizing the criminal sanction in an effort to deter voluntary intoxication and the results it may cause, *Powell v. Texas*, 392 U.S. 514, 530-31 (1968), even if responsibility is imposed without any finding of moral culpability toward the resulting harm. 392 U.S. at 544-45 (Black, J., concurring).[6] The wide constitutional latitude available to the states in this regard is apparent in the vast disparity among them in treating voluntary intoxication as a defense. *See* 1 Paul H. Robinson, *Criminal Law Defenses* § 65(a), at 289-93 (1984) (1995 Suppl. at 43-45).[7]

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[6] The Court remarked in *Powell*, 392 U.S. at 536, "The doctrines of . . . mens rea . . . have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States."

[7] Several state courts have held that the legislature may constitutionally redefine the mens rea element of crimes to

At common law, voluntary intoxication was not a defense in a criminal prosecution, even though the intoxication may have precluded a defendant from understanding his actions, having the required culpable mental state, or remembering the events. *See United States ex rel. Goddard v. Vaughn*, 614 F.2d 929, 934-35 and nn.5-7 (3d Cir.), *cert. denied*, 449 U.S. 844 (1980); *State v. Richardson*, 495 S.W.2d 435, 440 (Mo. 1973); *State v. Stacy*, 160 A. 257, 268 (Vt. 1932). During the last century, the courts, in an effort to mitigate the common law rule concerning voluntary intoxication, crafted a new rule. Evidence of voluntary intoxication was to be admissible to negate the required mental state in "specific intent" crimes, but was inadmissible where the charged offense only required "general intent." *Commonwealth v. Rumsey*, 454 A.2d at 1123. *See generally* Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045, 1046-49 (1944); Paulsen, *Intoxication as a Defense to Crime*, 1961 U. Ill. L.F. 1, 10-11.

As the courts struggled with determining whether a particular crime was one involving "specific" or "general" intent, it became apparent that the dividing line was based not so much on an inquiry of what subjective state of mind was required for each offense, but rather on matters of policy concerning what criminal responsibility should be borne by intoxicated offenders. *People v. Rocha*, 479 P.2d 372, 375-76 (Cal. 1971); *People v. Hood*, 462 P.2d 370, 377-79 (Cal. 1969). Generally, those crimes defined as requiring specific intent were those in which negation

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exclude evidence of voluntary intoxication to negate state of mind. *See State v. Souza*, 813 P.2d at 1385; *Wyant v. State*, 519 A.2d at 660; *Commonwealth v. Rumsey*, 454 A.2d at 1122.

due to intoxication would not result in total acquittal, but only lead to the offender's responsibility being lowered to a lesser crime. The "specific intent, general intent" dichotomy was severely criticized as creating artificial distinctions between criminal intents; as being elusive in definitions; and as leading to inconsistent results, *see, e.g.*, Hall, 57 Harv. L. Rev. at 1064; note, *Alcohol Abuse and the Law*, 94 Harv. L. Rev. 1660, 1684 (1981).[8]

If a state can constitutionally limit the application of voluntary intoxication as a defense[9] and the use of such evidence with respect to certain crimes, there is no reasoned basis to conclude that a state cannot take the next step and preclude the defendant from relying on it to negative the existence of the required mental state.[10] That some states have chosen to retain voluntary intoxication

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[8] Since Montana revamped its criminal statutes in 1973, borrowing concepts of mens rea from the Model Penal Code, specific intent need not be shown unless the statute defining the offense requires a specific purpose as an element thereof. *State v. Starr*, 664 P.2d 893, 897 (Mont. 1983). Deliberate homicide, the offense with which Egelhoff was charged and convicted, is not one of these "dual intent" crimes.

[9] A federal court of appeals has held that the defense of voluntary intoxication "was not required either constitutionally or at common law." *United States ex rel. Goddard v. Vaughn*, 614 F.2d 929, 935 (3d Cir. 1980).

[10] The Montana Supreme Court's reliance on *Martin* on this issue is misplaced, since the constitutional issue presented by § 45-2-203 differs markedly from that in *Martin*. *Martin* involved the question whether a state could require a defendant to shoulder the burden of showing self-defense when treated as an affirmative defense, not the question whether a legislature constitutionally may render evidence of voluntary intoxication irrelevant as a matter of law in determining mental state.

as a defense, or to admit such evidence to negative intent, does not make constitutionally infirm a more restrictive approach or rule. *See Martin*, 480 U.S. at 236; *McMillan v. Pennsylvania*, 477 U.S. 79, 90 (1986).

The Montana Supreme Court's reliance on *Chambers* is also misplaced. Citing *Chambers*, the court declared that disallowing the jury to consider evidence of Egelhoff's voluntary intoxication as to his mental state, pursuant to § 45-2-203, infringed upon his federal due process right to present a defense (App. 12a). Clearly, the Due Process Clause does not guarantee the accused the right to present any and all evidence to the trier of fact. For example, "the accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988); *Patterson v. New York*, 432 U.S. 197, 208-09 (1977) (state not required to recognize extreme emotional disturbance as a defense to murder). *See also* Fed. R. Evid. 403. Further, as discussed above, the Constitution does not demand that the state create a defense of voluntary intoxication.

The Montana court erroneously relied on *In re Winship* when it declared that Egelhoff's due process rights were violated when the jury was precluded from considering evidence of voluntary intoxication on the issue of mental state, since the State was thus relieved of part of its burden to prove beyond a reasonable doubt every element of the crime. (App. 12a, 14a.) As the Colorado Supreme Court stated in *People v. DelGuidice*, 606 P.2d at 843, authorities such as *Winship* do not decide this issue, but rather reaffirm the principle that the prosecution must adhere to the "beyond a reasonable doubt" standard

of proof, rather than a lesser standard, in overcoming the presumption of innocence of the accused in a criminal trial. *Winship* itself establishes the requirement of proof beyond a reasonable doubt with specific reference to the context of historical rules of evidence:

> [G]uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard.

397 U.S. at 362. The principle established in *Winship* cannot be syllogistically applied in a manner which abrogates the policy choices inherent in the rule precluding the jury from considering evidence of voluntary intoxication as to the defendant's mental state.

The Due Process Clause does not require the law to disregard an actor's culpability in causing the conditions he offers as a defense. A contrary conclusion, like that reached below, improperly ignores the critical fact that the defendant voluntarily caused his own intoxication and he should not be permitted to benefit from his own folly in becoming intoxicated. Such a conclusion transgresses the principle of personal responsibility forming the bedrock of all law. It also ignores evidentiary difficulties encountered in proving the mental state of an intoxicated defendant and the serious harms that such a lax attitude regarding voluntary intoxication may generate. Recognizing that alcohol and drug intoxication are factors involved in a large majority of egregious crimes, several state legislatures have concluded that allowing intoxication evidence on the issue of mental state runs the

unacceptable risk of potential manipulation by defendants and will lead to confusion of the jury who may not adequately appreciate that intoxication evidence is to be utilized only for the culpability inquiry, not for purposes of showing an excuse. The Montana Supreme Court's decision fails to recognize these commonsense policy considerations and warrants review.

CONCLUSION

The Petitioner respectfully requests that the petition for certiorari be granted.

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October 1995

No. 93-405

IN THE SUPREME COURT OF THE
STATE OF MONTANA

1995

STATE OF MONTANA,

Plaintiff and Respondent,

-v-

JAMES ALLEN EGELHOFF,

Defendant and Appellant

(Filed July 6, 1995)

APPEAL FROM: District Court of the Nineteenth Judicial District, In and for the County of Lincoln, The Honorable Robert S. Keller, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Ann C. German, Libby, Montana; Amy Guth, Lincoln County Public Defender, Libby, Montana

For Respondent:

Hon. Joseph P. Mazurek, Attorney General, Pamela P. Collins, Assistant Attorney General, Helena, Montana; Scott B. Spencer, Lincoln County Attorney, Libby, Montana

Heard: October 27, 1994
Submitted: February 23, 1995
Decided: July 6, 1995

Filed:

/s/ Ed Smith
Clerk

Justice Fred J. Weber delivered the Opinion of the Court.

James Allen Egelhoff (Egelhoff) appeals his conviction in the District Court of the Nineteenth Judicial District, Lincoln County, on two counts of deliberate homicide for the shooting deaths of his two companions following a day of drinking. Egelhoff was sentenced to forty years on each count and an additional two-year term for use of a weapon on each count, a total of eighty-four years, to run consecutively. The District Court also designated him as a dangerous offender for parole purposes. We reverse and remand.

The following issues are presented on appeal:

I. Was Egelhoff denied due process by a jury instruction that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense?

II. Did the District Court err in permitting a lay witness to give opinion testimony?

III. Are the jury verdicts finding Egelhoff guilty of two counts of deliberate homicide supported by substantial evidence?

IV. Did the District Court err in designating Egelhoff a dangerous offender for purposes of parole?

We conclude that Issue I is dispositive.

Egelhoff was convicted by a jury of two counts of deliberate homicide for the July 12, 1992 shooting deaths of Roberta Pavola (Pavola) and John Christianson (Christianson). At approximately midnight on July 12, 1992, their bodies were found in the front seat of the station wagon belonging to Christianson and Egelhoff was found in the rear cargo area, alive but intoxicated.

Egelhoff and a friend from Helena went to the Yaak area near Troy to pick mushrooms in early July 1992. Egelhoff had no transportation and no personal effects apart from some clothing and a .38 caliber handgun which he kept in a holster on his right hip.

Pavola and Christianson, also in the Yaak area to pick mushrooms, camped in an area near the place where they picked mushrooms. Egelhoff and his companion camped in the same area as Christianson and Pavola and became acquainted with them. Egelhoff's companion departed prior to the day Pavola and Christianson were killed.

Egelhoff, Pavola and Christianson sold their mushrooms on Sunday, July 12, 1992 and then bought beer and went to a party at a Troy apartment. They spent most of the day drinking at the party and in bars. The trio left the party sometime after 9:00 p.m. in Christianson's station wagon with Christianson driving, Pavola in the front passenger seat and Egelhoff in the rear.

Much of what occurred after they left the party that evening is unknown. Testimony at trial indicated that

Egelhoff and Christianson were seen in an IGA grocery store at approximately 9:20 p.m. and that Christianson's station wagon was seen being driven in an erratic manner on Highway 2 west of Troy a while later. Christianson's vehicle was also observed going off the road into a ditch several times. Law enforcement officers later located five places in the area where a vehicle had gone off the highway.

Numerous witnesses testified about their observations during this period of time. Two of the witnesses who observed the Christianson vehicle reported a possible drunken driver to the Lincoln County Sheriff's department shortly before midnight. When the station wagon came to its final stop and the sheriff's officers arrived, it was situated in a ditch, Pavola and Christianson were dead and Egelhoff was yelling obscenities from the rear of the vehicle.

Both Pavola and Christianson died from gunshot wounds. Pavola had been shot in the left temple area and Christianson was shot in the right back side of his head. Pavola's body remained in the passenger seat near the window and Christianson's body was found in the middle of the front seat close to Pavola with his legs on the floorboards in front of the passenger's seat and Pavola's upper body slumped over his legs. Egelhoff's gun was found on the floorboard near the brake pedal on the driver's side and Egelhoff was in the back of the station wagon where the back seat had been laid flat. Egelhoff's revolver was found with four loaded rounds and two empty casings. Egelhoff was lying on his right side with his head towards the back of the cargo area.

Detective Clint Gassett responded to a call about 1:00 a.m. on July 13, 1992, and came to the Libby hospital where Egelhoff had been brought by officers. He testified that Egelhoff was intoxicated, combative and cursing profusely. Detective Gassett, another officer and others attempted to physically restrain Egelhoff by holding him down on the table by his arms and chest. Detective Gassett testified that Egelhoff continued to act wildly during the five to six hours Gassett was at the hospital. Egelhoff would calm down at times only to repeatedly flare up again.

According to the testimony of Detective Gassett, at one point when another detective was preparing to take Egelhoff's photograph, Egelhoff looked directly at the detective, pulled his leg back and kicked the camera out of the detective's hands with the flat of his foot, knocking the camera to the floor. Detective Donald Bernall testified that he thought Egelhoff's coordination was good and he was surprised to learn that Egelhoff's blood alcohol content was .36 percent.

Egelhoff testified that he did not remember much of what happened on the evening of July 12, 1992, his last memory being that he was at the party at the Troy apartment and that the sun had not gone down. He testified he did not remember leaving the party, being in the station wagon, shooting the gun, or kicking Detective Bernall at the hospital. He further testified he remembered that at one point in the evening the station wagon was parked somewhere, and he and Christianson were sitting on a hill or a bank passing a bottle of Black Velvet back and forth between them. He had no recollection of Pavola being with them at that time.

Forensics testing identified gunshot residue on Egelhoff's hands. The bullet that killed Pavola entered her head at the left temple, exited the right back side of her head and was never found. Testimony by the State's firearms examiner indicated that the bullet which killed Christianson could have come from thousands of guns with characteristics like Egelhoff's gun.

At trial, Egelhoff contended that because he had been found unconscious and suffering from intoxication measured at .36 one hour after being brought to the hospital, his level of intoxication precluded him from having driven the car or undertaking the physical tasks necessary to have done what the prosecution claimed he had done. He contended that he suffered from an alcohol-induced amnesia (blackout) which prevented him from recalling the events of the night in question.

When ambulance attendants came to take him to the hospital, Egelhoff kept asking questions like, "Did you find him?" When he sobered up the next day, Egelhoff did not recall asking the questions or to whom he may have been referring when he asked them. Part of Egelhoff's theory which he presented at trial was that there was a fourth person in the car who had disappeared before officers arrived at the scene of the accident.

Dr. Clyde Knecht, a medical doctor who practiced in Libby, examined Egelhoff in the emergency room at the Libby hospital in the early morning hours of July 13, 1992. He testified that Egelhoff, judging from his blood alcohol level and his behavior, probably suffered from alcoholic "blackout" at some point in time and for some

period of time prior to the time of Dr. Knecht's examination. He also testified that an intoxicated person experiencing such a blackout may walk, talk, and fully function, with people around the person unable to tell that the person experienced a blackout.

A jury found Egelhoff guilty of two counts of deliberate homicide for the deaths of Christianson and Pavola. Because defendant is granted a new trial as a result of our reversal of his conviction as discussed below, we decline to address the remaining issues raised by Egelhoff.

I

Was Egelhoff deprived of due process when the District Court instructed the jury that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense of deliberate homicide?

Although Egelhoff raised four issues on appeal, oral argument was granted only on this issue concerning the constitutional validity of the 1987 amendment to § 45-2-203, MCA, regarding consideration by the jury of evidence of intoxication in criminal trials. Egelhoff voluntarily consumed alcoholic beverages on the day of the homicides to the extent that his blood alcohol level measured at least .33% and possibly .36%.

The District Court gave the following instruction to the jury containing statutory language from § 45-2-203, MCA, referring to voluntary intoxication:

INSTRUCTION NO. 11

A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the Defendant proves that he did not know that it was an intoxicating substance when he consumed the substance causing the condition.

We first address the State's argument that Egelhoff did not object to Instruction No. 11 on the ground now asserted. Egelhoff objected to Instruction No. 11 for several reasons, including constitutional reasons. Egelhoff's counsel objected to the instruction at the time of settling jury instructions. At that time, she claimed that § 45-2-203, MCA, is unconstitutional because it has the effect of negating the requirement that the State prove a mental state when proving deliberate homicide where the defendant is voluntarily intoxicated. She also argued that § 45-2-203, MCA, is unconstitutional because it shifts the burden of proof on the element of mental state from the prosecution to the defendant. In addition to making these objections during the trial, Egelhoff's counsel also made the same arguments and explained them in greater detail in her post-trial motion for a new trial. We conclude from our review of the record that Egelhoff's counsel properly objected to the giving of this instruction.

Egelhoff was convicted of two counts of deliberate homicide. To convict on a charge of deliberate homicide, the State must prove as an element of the offense that the defendant acted "knowingly" or "purposely" in causing

the death of another human being. Section 45-5-102, MCA. Egelhoff claimed § 45-2-203, MCA, is unconstitutional because it deprives defendants of due process by removing from the jury's consideration facts relevant to a determination of mental state, an essential element of the offense to be proven beyond a reasonable doubt by the State.

Section 45-2-203, MCA, as amended in 1987, provides:

> **45-2-203. Responsibility – intoxicated condition.** A person who is in an intoxicated condition is criminally responsible for his conduct and *an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense* unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition. (Emphasis supplied.)

In 1985, § 45-2-203, MCA, provided:

> **45-2-203. Responsibility – intoxicated or drugged condition.** A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. *An intoxicated or drugged condition may be taken into consideration in determination of the existence of a mental state which is an element or the offense.* (Emphasis supplied.)

Egelhoff does not contend that he has the right to the affirmative defense of voluntary intoxication. He challenges only the exclusion of evidence from the jury's deliberations for purposes of determining mental state (the 1987 amendment). Egelhoff contends that Instruction No. 11, containing the statutory language from § 45-2-203, MCA, removed evidence of alcohol intoxication from the jury's consideration in determining whether he acted "knowingly" or "purposely" and relieved the prosecution of its burden to prove the required mental state for deliberate homicide, which is constitutionally impermissible.

The State contends that Egelhoff was not prejudiced because he was allowed to use the evidence of intoxication in order to explain his inability to remember the events of the evening as being the result of an alcohol-induced "blackout" and also as evidence of his lack of physical coordination which would have made it impossible for him to have driven Christianson's station wagon the night of the homicides. The State also argues that Egelhoff was not deprived of due process because the court also instructed the jury that the State had the burden of proving all elements of the offense beyond a reasonable doubt.

It is well established that in order to afford a defendant due process under the Fourteenth Amendment of the United States Constitution, the State must prove every element of the offense beyond a reasonable doubt. *See* In Re Winship (1970), 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368, 375. In addition, Sandstrom v. Montana (1979), 442 U.S. 510, 524, 99 S.Ct. 2450, 2459, 61 L.Ed.2d 39, 51, held that an instruction which shifted the burden of proof on the element of mental state to the

defendant is unconstitutional. In *Sandstrom*, the burden shifting resulted from instructing the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." The *Sandstrom* presumption was a rebuttable presumption.

Engelhoff argues that in *Sandstrom* the defendant was at least allowed the opportunity to rebut the presumption. He contends he is denied that opportunity because the instruction prohibits consideration of his intoxication in determining whether he acted knowingly and purposely. Egelhoff also contends that Morissette v. United States (1951), 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288, supports his arguments because the United States Supreme Court there condemned a process by which a defendant could be convicted of criminal intent without proof by the government, which was determined to be inconsistent with our philosophy of criminal law.

Our concern here is with proof of the mental state element of the offense of deliberate homicide. The evidence presented at trial established that Egelhoff had a level of intoxication measured at .36. It is clear that such evidence was relevant to the issue of whether Egelhoff acted knowingly and purposely; yet Instruction No. 11 precluded the jury from considering it for that purpose.

The prosecution presented a great deal of evidence which reflected on Egelhoff's ability to shoot Pavola and Christianson despite his level of intoxication. That evidence included the following: In order to commit the crimes, he had to take the gun from the glove compartment of the vehicle. He made an attempt to flee after he went into the ditch. He tried to avoid detection when

Rebecca Garrison tried to approach the car. Ms. Garrison noticed a stick which she assumed must have been used by Egelhoff to depress the accelerator so that Egelhoff could drive from the back seat. He could talk. At the IGA store at 9:20 p.m., Egelhoff spoke well and did not slur his words. He later told Ms. Garrison to "stay away" and he talked to the ambulance driver. He had physical energy and strength. He tried to avoid detection by another of the witnesses who had stopped to give assistance. Detective Bernall testified that his coordination was good as was demonstrated by his kicking of the camera. The evidence was presented by the State to establish that Egelhoff acted "purposely" or "knowingly." Such evidence could be properly considered by the jury in its determination of whether or not he acted "purposely" or "knowingly."

However, Egelhoff was not allowed to rebut such evidence with evidence that his level of intoxication precluded him from forming the requisite mental state. As a result of the elimination of the opportunity of using this rebuttal evidence, the prosecution's burden of proof for the element of mental state was reduced.

This is a denial of due process. Due process is "the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi (1973), 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297, 308. This right to present a defense is fundamental. *Chambers*, 410 U.S. at 302, 93 S.Ct. at 1049, 35 L.Ed.2d at 312. In Martin v. Ohio (1987), 480 U.S. 228, 233, 107 S.Ct. 1098, 1101, 94 L.Ed.2d 267, 274, the United States Supreme Court upheld a conviction of murder where the defendant attempted to prove self defense. The Supreme Court held

it was not a violation of due process to place the burden of proving self defense on a defendant charged with committing aggravated murder. The Court in *Martin* emphasized that the defendant had the opportunity under the law and instructions to justify the killing by showing herself blameless because she acted in self defense. As a part of that discussion the *Martin* Court then stated:

> It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case, *i.e.*, that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard. Such instruction would relieve the State of its burden and plainly run afoul of *Winship's* mandate. 397 U.S., at 364. The instructions in this case could be clearer in this respect, but when read as a whole, we think they are adequate to convey to the jury that all of the evidence, including the evidence going to self-defense, must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime.
>
> . . .
>
> When the prosecution has made out a prima facie case and survives a motion to acquit, the jury may nevertheless not convict if the evidence offered by the defendant raises any reasonable doubt about the existence of any fact necessary for the finding of guilt. Evidence creating a reasonable doubt could easily fall far short of proving self-defense by a preponderance of the evidence. . . .

Martin, 480 U.S. at 233-34, 107 S.Ct. at 274-75, 94 L.Ed.2d at 1102. While the above statement may not have been essential to the holding of the Court, it emphasizes a clear distinction between placing a burden upon a defendant to prove a specific aspect of her defense, in this case self defense, and instructing a jury that self defense evidence *could not be considered* in determining whether there was a reasonable doubt as to her guilt. The analysis is clearly applicable to our present case. While Egelhoff was given the opportunity to present evidence of his level of intoxication, the instruction prevented consideration by the jury as it decided whether or not there was a reasonable doubt as to Egelhoff's acting "knowingly" and "purposely." Because the jury was not allowed to consider that evidence for such a purpose, the State was relieved of part of its burden to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. It was reversible error to instruct the jury not to consider it.

By allowing the jury to consider such evidence, we permit the jury to make its decision on all of the relevant evidence as required under *Martin*. By instructing the jury that it may not consider intoxication evidence for purposes of determining a mental state of "knowingly" or "purposely," the jury may be misled into believing the State has proved the mental state beyond a reasonable doubt and that is why defendant cannot introduce evidence in opposition to a specific state of mind. The State should never escape its burden of proof of each element of the offense.

Egelhoff's argument focuses on "burden shifting" which is not technically what happens in a case such as the present one. The burden is not shifted but rather it is

lessened because the defendant is precluded from presenting arguments concerning the prosecution's "failure of proof" of the subjective mental state element required for conviction of a crime which includes the mental state of acting "knowingly" or "purposely."

Similar arguments were presented in State v. Byers (1993), 261 Mont. 17, 41-41, 861 P.2d 860, 875. There are significant factual differences between *Byers* and the present case, because Byers did not rely upon intoxication as an element of his defense and because there was no question in *Byers* that he had committed the two homicides, whereas in the present case Egelhoff relies on the intoxication defense as part of his argument and the basic issue was whether or not he actually committed the homicides.

In *Byers* the holding was that the district court did not commit reversible error by instructing the jury that voluntary intoxication is not a defense to criminal activity. Our holding in the present case does not conflict with the express holding in *Byers*. In *Byers* we did state that the intoxication instruction which was identical to that in the present case did not relieve the State of its burden of proving beyond a reasonable doubt all of the elements of the offense. In making that statement, although it was dicta, we were not correct as appears from our foregoing analysis. We overrule any of the statements made in *Byers* to the extent that it indicates it is constitutional to instruct that an intoxicated condition may not be taken into consideration in determining the existence of a mental state which is an element of the offense.

We conclude that the defendant had a due process right to present and have considered by the jury all relevant evidence to rebut the State's evidence on all elements of the offense charged. We conclude that the following portion of § 45-2-203, MCA (1993), is a violation of due process and is therefore unconstitutional:

> [an intoxicated condition] . . . may not be taken into consideration in determining the existence of a mental state which is an element of the offense . . .

We hold Egelhoff was denied due process when the jury was instructed that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense.

For the benefit of the bench and bar of Montana, we briefly discuss the extent to which the holding of this decision has application to other cases. In a criminal case we have noted that, at a minimum, all "new" rules of constitutional law must be applied to cases still subject to direct review at the time the "new" decision is handed down. State, City of Bozeman v. Peterson (1987), 227 Mont. 418, 420, 739 P.2d 958, 960, citing Shea v. Louisiana (1985), 470 U.S. 51, 57, 105 S.Ct. 1065, 1069, 84 L.Ed.2d 38, 45.

The United States Supreme Court has refined its position since we decided *Peterson*, stating as follows:

> We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final[.]

Griffith v. Kentucky (1987), 479 U.S. 314, 328, 107 S.Ct. 709, 716, 93 L.Ed.2d 649, 661. We conclude that the foregoing rule is binding upon this Court.

With regard to the question of retroactivity, the United States Supreme Court has additionally made its position more clear and we find this also to be binding upon us:

> Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, even-handed justice requires that it be applied retroactively to all who are similarly situated. . . .
>
> It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final. [Citations omitted.]

Teague v. Lane (1989), 489 U.S. 288, 300-01, 109 S.Ct. 1060, 1070, 103 L.Ed.2d 334, 349.

We conclude that we have here established a "new rule." Based upon the foregoing authorities, we conclude that our decision is applicable to all cases still subject to direct review by this Court on the date of this opinion. With regard to collateral review as compared to a direct review of cases, the United States Supreme Court has

clarified its position as to collateral review of criminal convictions, stating:

> [W]e now adopt Justice Harlan's view of retroactivity for cases on collateral review. Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.
>
> . . .
>
> The first exception suggested by Justice Harlan – that a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal-law-making authority to proscribe," . . .
>
> The second exception suggested by Justice Harlan – that a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty,' " [citation omitted] – we apply with a modification. The language used by Justice Harlan in *Mackey* leaves no doubt that he meant the second exception to be reserved for watershed rules of criminal procedure[.]

Teague, 489 U.S. at 310-11. We conclude that such view of retroactivity for cases on collateral review is binding upon this Court.

We conclude that this decision does not fall within either of the two above described exceptions to the general rule of non-retroactive application to collateral

review. We therefore state this opinion will apply retroactively to those cases still subject to final decision on direct review on the date of this opinion, but will not apply retroactively to cases on collateral review after the date of this opinion.

Reversed and remanded for a new trial.

/s/ Fred J. Weber
Justice

We Concur:

/s/ J. A. Turnage
Chief Justice

/s/ Karla M. Gray

/s/ James C. Nelson
Justices

/s/ James E. Purcell
District Judge James E. Purcell

Justice James C. Nelson specially concurs.

I concur in our opinion. I write separately only because of my lingering concern that our decision will be misread as allowing an affirmative defense of voluntary intoxication in criminal cases. That is absolutely not so. This case is not about a defense. Rather, it deals with burden of proof and the fundamental obligation of the State to prove each element of a criminal charge – including the mental state element – beyond a reasonable doubt.

As a general proposition, the legislature may enact statutes that specify what defenses are and are not available to a charge of criminal conduct. In Montana, the legislature has, permissibly, determined that voluntary intoxication is not a defense to the commission of a crime and that, while voluntarily intoxicated, a person is still criminally responsible for his or her conduct. In other words, a defendant may not come before the jury and say: "I shot and killed Smith because (or while) I was drunk. You must, therefore, acquit me." To that extent, the portion of § 45-2-203, MCA, which provides that "an intoxicated condition is not a defense to any offense" was and is constitutional. That portion of the statute is not at issue in this case.

On the other hand, as pointed out in our opinion, it is always the obligation of the State to prove beyond a reasonable doubt each and every element of the crime charged, including that the defendant acted with the requisite mental state. If, in a given case, the only way that the prosecution can prove the defendant's mental state is by *prohibiting* the jury from considering the fact that the defendant was too intoxicated to form the requisite mental state, then the State effectively and impermissibly has been relieved of all or part of its burden to prove beyond a reasonable doubt an essential element of the crime charged. Under both the Montana and federal constitutions, the defendant must be allowed to come to the jury and, in effect, say: "I did not act purposely or knowingly; and the reason that I did not, is because I was too drunk to act with either of those two mental states. If you, jury, conclude that to be true – and that is solely your call based on all the evidence – then you must also

conclude that the prosecution has not proven an essential element of the crime charged beyond a reasonable doubt, and you must, therefore, acquit me."

In short, the language " . . . *and may not be taken into consideration in determining the existence of a mental state which is an element of the offense* . . . " (emphasis added) inserted in the 1987 and subsequent versions of § 45-2-203, MCA, effectively and impermissibly relieves or lessens the burden of the State to prove beyond a reasonable doubt an essential element of the offense charged – the mental state element – by statutorily precluding the jury from considering the very evidence that might convince them that the State had not proven that element.

It remains the burden of the State to prove beyond a reasonable doubt mental state *despite* the defendant being intoxicated. The statutory language at issue here eliminates or lessens that burden and is, therefore, constitutionally infirm.

Under § 45-2-203, MCA, and our decision here, a voluntarily intoxicated defendant remains criminally responsible for his conduct and his voluntarily intoxicated condition continues not to be a defense to any offense. However, the defendant's intoxicated condition may be taken into consideration by the finder of fact in determining the existence of a mental state which is an element of the offense charged.

/s/ James C. Nelson
Justice

Justice Karla M. Gray joins in the foregoing special concurrence.

/s/ Karla M. Gray
Justice

Chief Justice J. A. Turnage, specially concurring:

I respectfully specially concur, specifically to the majority opinion holding that the opinion will apply retroactively to those cases still subject to final decision on direct review on the date of this opinion but will not apply retroactively to cases on collateral review after the date of this opinion.

I further specially concur and urge the next session of the Montana legislative assembly to amend § 45-2-203, MCA, to eliminate the problem this Court finds to exist in the 1987 amended version of this statute. I would recommend that the legislature consider amending § 45-2-203, MCA, to reinstate the provisions thereof that existed in the 1985 version of this statute. Such amendment would essentially reinstate language that "[a]n intoxicated or drugged condition may be taken into consideration in determination of the existence of a mental state which is an element of the offense."

/s/ J.A. Turnage
Chief Justice

Justice Terry N. Trieweiler specially concurring in part and dissenting in part.

I concur with the majority's conclusion that the stricken portions of § 45-2-203, MCA (1993), violated Egelhoff's right to due process, and therefore, were unconstitutional. However, I do not agree with all that is said in the majority opinion.

I specifically disagree that a principle of constitutional law can be made applicable to some citizens and not others.

In my view, the role of this Court is to interpret the Constitution and apply it to the parties before it. Whether the parties come before this Court by direct appeal, or by statutorily authorized collateral review, is irrelevant. The protections afforded by the Constitution apply to everyone. It makes no sense to have different interpretations based on the procedure by which an unconstitutionally treated person arrives in our Court.

The majority relies on *Teague v. Lane* (1989), 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d. 334, for the principle that "new" rules of constitutional law must be applied to all cases still subject to review, but only under limited circumstances to cases which are collaterally reviewed. *Teague*, and the U.S. Supreme Court's earlier decision in *Griffith v. Kentucky* (1987), 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649, are based largely on the earlier dissent of Mr. Justice Harlan in *Mackey v. United States* (1971), 401 U.S. 667, 91 S. Ct. 1160, 28 L. Ed. 2d. 404. In *Mackey*, the majority of the U.S. Supreme Court refused to apply two of its decisions interpreting the Fifth Amendment right against compulsory self-incrimination to other cases

which were pending on direct appeal at the time those cases were decided. In dissent, Justice Harlan pointed out that selectively applying the Constitution to people who are similarly situated based merely on the circumstances or timing of their appearance in court is the antithesis of the judiciary's responsibility. Since his observations are equally applicable to the distinction made between those defendants who appear by direct appeal and those who appear by collateral review, they are worth repeating.

> We announce new constitutional rules, then, only as a correlative of our dual duty to decide those cases over which we have jurisdiction and to apply the Federal Constitution as one source of the matrix of governing legal rules. We cannot release criminals from jail merely because we think one case is a particularly appropriate one in which to apply what reads like a general rule of law or in order to avoid making new legal norms through promulgation of dicta. This serious interference with the corrective process is justified only by necessity, as part of our task of applying the Constitution to cases before us. Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of judicial review.

. . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.

We apply and definitively interpret the Constitution, under this view of our role, not because we are bound to, but only because we occasionally deem it appropriate, useful, or wise. That sort of choice may permissibly be made by a legislature or a council of revision, but not by a court of law.

. . . .

. . . I continue to believe that a proper perception of our duties as a court of law, charged with applying the Constitution to resolve every legal dispute within our jurisdiction on direct review, mandates that we apply the law as it is at the time, not as it once was. Inquiry into the nature, purposes, and scope of a particular constitutional rule is essential to the task of deciding whether that rule should be made the law of the land. That inquiry is, however, quite simply irrelevant in deciding, once a rule has been adopted as part of our legal fabric, which cases then pending in this Court should be governed by it.

Mackey, 401 U.S. at 678-81, 28 L. Ed. 2d at 412-14 (Harlan, J., dissenting).

While Justice Harlan was unwilling to apply the same logic to those cases reviewed by a petition for a federal writ of habeas corpus, I can see no reason for making such a distinction under state law. The bases by which criminal convictions can be collaterally reviewed in Montana are very limited. *See* § 46-22-101, MCA (habeas corpus), and § 46-21-105(2), MCA (limitations on post-conviction relief). Furthermore, no criminal conviction can be reversed under Montana law, even if constitutional rights were violated, where the constitutional

infraction did not contribute to the defendant's conviction. Section 46-20-104, MCA.

The effect of the majority's limitation on the application of their decision, then, is to hold that even in those cases where people have been convicted and jailed in violation of their right to due process, and even where that violation is raised properly by collateral review, we will not consider the constitutional infraction simply because it is brought to our attention by collateral review, rather than direct appeal.

This dichotomy is irrational and offends the very traditions of fairness and due process which we, as a judicial body, are charged to enforce.

For these reasons, while I concur with the result arrived at in this case, I dissent from that part of the majority opinion which would selectively apply the constitution of this State, or of the United States, based upon the procedure by which offensive governmental conduct is brought to our attention.

/s/ Terry N. Trieweiler
Justice

Justice William E. Hunt, Sr., joins in the foregoing concurring and dissenting opinion.

/s/ William E. Hunt, Sr.
Justice

INSTRUCTION NO. 7

An Information has been filed charging the defendant, JAMES ALLEN EGELHOFF, with the offenses of **DELIBERATE HOMICIDE, two counts,** alleged to have been committed in Lincoln County, State of Montana, on or about July 12, 1992, or the early morning hours of July 13, 1992. The defendant has pled not guilty. The jury's task in this case is to decide whether the defendant is guilty or not guilty based upon the evidence and the law as stated in my instructions. These are some of the rules of law that you must follow:

1. The filing of an Information against this Defendant is simply a part of the legal process to bring this case into Court for trial and notifying the Defendant of the charge against him. Neither the Information nor the charge contained therein is to be taken by you as any indication, evidence or proof that he is guilty of any offense.

2. By his plea of not guilty, the Defendant denies every allegation of the charges against him.

3. The State of Montana has the burden of proving the guilt of the Defendant beyond a reasonable doubt.

4. Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person would rely and act upon it in the most important of his own affairs. Beyond a reasonable doubt does not mean beyond any doubt or beyond a shadow of a doubt.

5. The Defendant is presumed to be innocent of the charge against him. This presumption remains with him

throughout every stage of the trial and during your deliberations on the verdict. It is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the Defendant is guilty. The Defendant is not required to prove his innocence.

GIVEN: /s/ Robert S. Keller
District Judge

INSTRUCTION NO. 8

A person commits the offense of deliberate homicide if he purposely or knowingly causes the death of another human being.

GIVEN: /s/ Robert S. Keller
District Judge

INSTRUCTION NO. 9

A person acts purposely when it is his conscious object to engage in conduct of that nature or to cause such a result.

GIVEN: /s/ Robert S. Keller
District Judge

INSTRUCTION NO. 10

A person acts knowingly when he is aware of his conduct or when he is aware under the circumstances his conduct constitutes a crime; or, when he is aware there exists the high probability that his conduct will cause a specific result.

GIVEN: /s/ Robert S. Keller
District Judge

INSTRUCTION NO. 11

A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the Defendant proves that he did not know that it was an intoxicating substance when he consumed the substance causing the condition.

GIVEN: /s/ Robert S. Keller
District Judge

INSTRUCTION NO. 13

To convict the defendant of deliberate homicide, Count I, the State must prove the following elements beyond a reasonable doubt:

1. That the defendant caused the death of John Darrell Christenson, a human being; and

3 [sic]. That the defendant acted purposely or knowingly.

GIVEN: /s/ Robert S. Keller
District Judge

INSTRUCTION NO. 14

To convict the defendant of deliberate homicide, Count II, the State must prove the following elements beyond a reasonable doubt:

1. That the defendant caused the death of Roberta Jean Pavola, a human being; and

3 [sic]. That the defendant acted purposely or knowingly.

GIVEN: /s/ Robert S. Keller
District Judge

(2)

No. 95-566

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

JAMES ALLEN EGELHOFF,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is a defendant deprived of his right to due process under Article II, Section 17 of the Montana Constitution and the Fourteenth Amendment to the United States Constitution when a jury is instructed, pursuant to a state statute, that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense?

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the provisions cited by Petitioner, the following is relevant:

Mont. Const. article II, section 17:

> **Due process of law.** No person shall be deprived of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

Respondent, James Allen Egelhoff, was charged with two counts of deliberate homicide, in violation of Mont. Code Ann. § 45-5-102 (1991).

At approximately midnight on July 12, 1992, the bodies of Roberta Pavola and John Christianson were found in the front seat of Christianson's station wagon, and respondent was found in the rear cargo area, alive but intoxicated. Pavola and Christianson had each died from a gun shot wound to the head. Egelhoff's blood alcohol level was between .33 and .36 percent. Egelhoff's consumption of alcohol was voluntary.

At the trial, Egelhoff contended that a fourth person was responsible for the shootings. Proof of respondent's very high level of intoxication was offered to prove that he would not have been physically able to commit the acts charged by the state (including safely driving a dangerous road at night) and to explain his alcohol induced amnesia. He did not offer it to prove that his intoxication prevented him from forming the statutorily requisite state

of mind. This was irrelevant because he denied that he had pulled the trigger.

The state requested, and the trial court gave, over respondent's objection, an instruction pursuant to Mont. Code Ann. § 45-2-203 (1991) as follows:

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the Defendant proves that he did not know that it was an intoxicating substance when he consumed the substance causing the condition.

Egelhoff objected to this instruction on several grounds, the primary one being that it was irrelevant and prejudicial because he had not raised the issue of the effect of intoxication upon mental state. Secondarily, he challenged the statute's constitutionality, in denying due process under the Montana and federal constitutions.

Following Egelhoff's conviction, he appealed to the Montana Supreme Court on several grounds. The court limited oral argument to the due process argument, and all seven justices held the statute and the instruction to be unconstitutional as a violation of Egelhoff's right to due process. In the concurring opinion of Justice Nelson, he referred to both the Montana and the federal constitutions in his discussion of the deprivation of due process.

REASONS FOR DENYING THE WRIT

I. There is an independent and adequate state ground.

Respondent relied on both the Montana and federal constitutional due process provisions in challenging the statute. At least one of the seven justices, Justice Nelson, cited the Montana constitution in his opinion. Thus, there is an independent and adequate state ground for the decision. *Michigan v. Long*, 463 U.S. 1032 (1983).

II. The effect of intoxication on respondent's mental state is irrelevant.

At the first trial of this matter, respondent objected to the instruction on intoxication because he had not argued that he was "too drunk to know what he was doing." Rather, he denied doing anything. On a retrial of this matter, it will continue to be irrelevant. This Court should not exercise its discretionary jurisdiction to decide a matter which ought not to have been injected into the trial record in the first place. Wise use of the Court's limited resources militates against their expenditure on an issue irrelevant to this respondent.

III. There is not a considerable disagreement among state courts of last resort on the question at issue in this case.

The rules of this Court defining the limits of this Court's jurisdiction over State courts' rulings on state law do not lend support to petitioner's request that this Court invoke its discretionary jurisdiction to review the opinion below. Rule 10 of the Rules of the Supreme Court of the

United States recites as a reason for granting a writ of certic-ari,

> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

Petitioner cites to only four states whose courts of last resort are claimed to be in conflict with the Montana Supreme Court. Careful analysis of these cases does not support the view that this Court should invoke its discretionary jurisdiction. There is not the "considerable disagreement among state courts of last resort on the question at issue in this case," sufficient to invoke this Court's jurisdiction. *Morgan v. Illinois*, 504 U.S. ___, 119 L. Ed. 2d 492, 500 (1992).

The decisions can be explained by an examination of the historical use in the different states of intoxication evidence. The Montana Supreme Court in its decision ratified a rule had been in effect for years as part of the common law, and was codified in the criminal code until 1987, when the unconstitutional amendment was enacted. *State v. Palen*, 178 P.2d 862 (Mont. 1947), decided under former law (the predecessor to § 45-2-203, M.C.A.), held that voluntary intoxication *must* be considered in a first degree murder case, not as a complete defense, but in determining a mental state. In 1987, the statute was amended to prohibit the consideration of such evidence. The Montana Supreme Court, in holding the amendment unconstitutional, simply returned the practice to the status quo ante, which had been approved by that court for years.

Petitioner cites *State v. Ramos*, 648 P.2d 119 (Ariz. 1982) which is inapposite as the statute construed there did allow the jury to consider intoxication in determining the culpable mental state. Petitioner also cites to the 1993 amendment to that statute which has not been construed and which excludes intoxication as a "defense," which is not inconsistent with the Montana decision.

Delaware's statute cited by petitioner on page 8 of the Petition has eliminated the affirmative defense of voluntary intoxication, Del. Code Ann. tit. 11, § 421 (1976). That is not the issue in the instant action. *Wyant v. State*, 519 A.2d 649 (Del. 1986), goes further than the statute in holding that evidence of intoxication is inadmissible on the issue of state of mind. That opinion recites the "tortuous" history of the Delaware legislation. Montana has had no such history, but has adhered to the rule announced in *State v. Egelhoff* for a century.

Petitioner cites *State v. Souza*, 813 P.2d 1384 (Haw. 1991). However, the Hawaii state statute differs substantially from that struck down in Montana. The Hawaii statute, Haw. Rev. Stat. § 702-230 provides that,

> Evidence of self-induced intoxication of the defendant is admissible to prove or negative conduct or to prove state of mind sufficient to establish an element of the offense. Evidence of self-induced intoxication of the defendant is not admissible to negative the state of mind sufficient to establish an element of an offense.

This language is more consistent with the use of intoxication as a *defense*, which is not the argument here. Presenting evidence to negate proof by the state is in the nature of an affirmative defense such as justification or

duress. It anticipates that the state has carried its burden of proof and that then the defense presents affirmative evidence to rebut the proof. That differs from the situation where the state, as part of its proof, must prove the requisite mens rea, which proof would necessarily, in the case of an intoxicated person, include evidence that, despite the intoxication, the defendant had the requisite mental state which is an element of the charged offense. This evidence is then considered by the jury in its deliberations. An additional qualifier when reading *Souza* is that defendant was charged with murder in the second degree, not first degree. It may be that the charging authority took Souza's intoxication into account when charging a lesser offense as there do not appear to be any other grounds for mitigation in the opinion. One cannot extrapolate from *Souza* that had he been charged with deliberate homicide the same result would have obtained.

The Missouri decision cited by petitioner, *State v. Erwin*, 848 S.W.2d 476 (Mo. 1993), *cert. denied*, 114 S. Ct. 88 (1993) upheld a rule which had there been law for years, except for a four-year hiatus, *State v. Richardson*, 495 S.W.2d 435 (1973). In *Richardson*, the court acknowledged that the Missouri rule was not that of the majority of states, but did not reject it, stating that it declined to consider overturning a rule which went back to 1855. It is clear that the Missouri rule is an anomaly, and the only rationale its longevity. Montana has, by contrast, recognized that voluntary intoxication may be considered by the jury for years. It is an integral part of the common law. This Court should pay deference to these efforts by the states to fashion their particular practices of criminal law which reflect the historical and traditional practices.

The *Erwin* court held that it was error to give the instruction that was given in this case, with respect to the language that an intoxicated person is criminally responsible. It was held to be a comment on the evidence and a denial of due process and the case was reversed for that reason. The State of Missouri petitioned this court to grant certiorari, which was denied, *Missouri v. Erwin*, 114 S. Ct. 88 (1993).

Missouri is perhaps unique in historically prohibiting consideration of intoxication in determining the existence of a mental state. This was changed, for a short time, by legislation passed in 1979, which adopted the majority rule, § 562.076, Missouri Revised Statutes, so that the statute than read, in pertinent part:

> 1. A person who is in an intoxicated or drugged condition whether from alcohol, drugs, or other substances, is criminally responsible for conduct unless such condition
>
> (1) Negatives the existence of the mental states of purpose or knowledge when such mental states are elements of the offense charged or of an included offense. . . .

The comment to the proposed code stated:

> Subsection 1(1) adopts the view of the vast majority of jurisdictions that where the crime requires that to be guilty the defendant must have had a specific mental state, evidence of his being intoxicated is admissible as bearing on whether he did in fact have that mental state. Missouri (along with possibly two other states) does not follow this approach, but instead

> excludes evidence of the defendant's intoxication on the issue of whether he had the required "specific intent."

Four years later, the Missouri legislature amended § 562.076 to again prohibit the consideration of intoxication evidence on the existence of a mental state.

Citation to these four jurisdictions is not evidence of the considerable disagreement among state courts of last resort necessary to invoke this court's jurisdiction.

IV. There is not presented an important question of federal law which has not been, but should be, settled by this Court, nor does the decision conflict with applicable decisions of this Court.

Rule 10 of the Rules of the Supreme Court of the United States also recites as a reason for granting a writ of certiorari,

> (c) When a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

This Court has visited a similar question some time ago. Although the opinion did not rest on the due process analysis which has evolved in the last half century, this Court considered this issue in *Hopt v. People*, 104 U.S. 631, 633-634 (1881). There, a Utah defendant had been convicted of deliberate homicide for an act committed while intoxicated. He petitioned to this Court, claiming that he

was entitled to have an instruction to the jury that intoxication could be considered when determining his mental state. This Court, in reversing his conviction, stated:

> At common law, indeed, as a general rule, voluntary intoxication affords no excuse, justification or extenuation of a crime committed under its influence. (citations omitted) But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question, whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury. . . . (citations omitted)

Hopt has been cited for this rule in numerous cases and annotations. It has never been overruled or modified by this Court, and its logic is contemporary despite its age. This Court has not seen fit to revisit this issue and the decision of the Montana Supreme Court employs the same logic in arriving at a compatible result. There is no compelling reason for this Court to undertake to fine tune this sort of practice.

There is no compelling reason why this Court should undertake to decide this issue for all of the states.

Petitioner argues, at page 13 of the Petition for Writ of Certiorari,

> If a state can constitutionally limit the application of voluntary intoxication as a defense, and the use of such evidence with respect to certain crimes, there is no reasoned basis to conclude

> that a state cannot take the next step and preclude the defendant from relying on it to negative the existence of the required mental state.

Petitioner cites *United States ex rel. Goddard v. Vaughn*, 614 F.2d 929, 935 (3rd Cir.), *cert den.*, 449 U.S. 844 (1980), as authority for the assertion that states "can constitutionally limit the application of voluntary intoxication as a defense." The reference in *Goddard* to the "gratuitous defense" of voluntary intoxication is *dicta*, and the opinion does not support the conclusion urged by petitioner. The issue in *Goddard* was the defendant's complaint that he was the victim of impermissible burden-shifting when the Delaware trial court instructed the jury that defendant had the burden of proving intoxication. The federal habeas opinion, in the Third Circuit, phrased the question posed as, "Once the defense of intoxication has been raised, was the prosecutor required to prove its absence?" 614 F.2d at 931. The only lesson one learns from *Goddard* is that the state may allow affirmative defenses, and, if allowed, can require the defendant to present evidence of that defense. The Third Circuit did not find unconstitutional burden-shifting because the "plaintiff's case did not rely on a presumption that the defendant was called upon to rebut," *Id.* at 936. Thus, the *Goddard* decision would comport with *Martin v. Ohio*, 480 U.S. 228 (1987), that the state may require a defendant to present evidence to prove the affirmative defense, but may not disallow consideration of the evidence altogether. In any event, reliance on *Goddard* is misplaced in this case, where the Montana Supreme Court specifically held that there is no "defense" of voluntary intoxication available.

Its decision comports with traditional due process analysis as developed in the cases cited therein.

Federal courts have traditionally deferred to the states to define the elements of offenses, the designation of defenses, and the allocation of burden of proof. *Patterson v. New York*, 432 U.S. 197 (1977). This traditional deference should be accorded to the Montana Supreme Court in its decision here and the petition for the writ of certiorari should be denied.

CONCLUSION

For the reasons that there is an independent state law ground for the decision below; that the effect of intoxication on this respondent's mental state is irrelevant and should not have been injected into the record; that there is not a considerable disagreement among state courts of last resort; and that there is not presented an important question of federal law which has not been, but should be settled by this Court, nor does the decision conflict with applicable decisions of this Court; respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 95-566

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

JAMES ALLEN EGELHOFF,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

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PETITIONER'S REPLY BRIEF

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The brief in opposition filed by the Respondent, James Allen Egelhoff, erroneously contends that the petition for writ of certiorari should be denied because the state court relied upon an adequate and independent state ground; because the effect of intoxication on Respondent's mental state is irrelevant; because there is not considerable disagreement among state courts of last resort on the constitutional issue; and because a prior ruling of this Court has considered a similar issue.

I.

Respondent claims that the Court cannot exercise jurisdiction because there is an adequate and independent state ground. This Court, in *Michigan v. Long*, 463 U.S. 1032, 1042 (1982), created a new rule, or presumption, which assumes that the Court has jurisdiction to reach the federal question on review "when it is not clear from the opinion

itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law."

In the instant case, it is clear that the Montana court did not rest its decision on an independent state ground. Only one reference is made to the Montana constitution and this is contained in Justice Nelson's special concurring opinion which is joined by only one other justice. The opinion of the court below relied exclusively on its understanding of the requirements of the Due Process Clause as enunciated in *In re Winship*, 397 U.S. 358 (1970), and other federal cases. Not a single state case was cited to support the state court's determination that the statute was unconstitutional, either in the opinion of the court or in the concurring opinions. Further, Respondent does not and cannot assert that Montana courts have provided greater protection under the due process clause of the state constitution than is afforded under the Fourteenth Amendment to the United States Constitution.

Under *Long*, this Court's jurisdiction is presumed absent a plain statement that the decision below rested on an adequate and independent state ground. There is no such plain statement in the decision below. It is clear that the state court "felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977).

----------♦----------

II.

The Respondent's contention that the validity of the intoxication instruction and the statute from which it was taken is irrelevant is startling. He raised the instruction's constitutionality on appeal before the Montana Supreme Court and prevailed, with the result that his convictions for two deliberate homicides were overturned. Additional Reply Br. Appellant at 10, 21-31 (App. 31a-45a). If Respondent's position concerning the relevancy of the instruction in the

opposition to the petition herein is credited, the only conclusion is that his trial and conviction in fact were unaffected by the principal error he alleged on direct appeal. The court below obviously did not so believe. Regardless of the instruction's relevancy during his trial, however, the Montana Supreme Court's reversal of his conviction on this issue is sufficient to establish a justiciable controversy warranting this Court's review. *See Asarco v. Kadish*, 490 U.S. 605, 618-19 (1989).

----------♦----------

III.

Respondent argues that there is not considerable disagreement among state courts to warrant review by this Court. A conflict between the decisions of the highest courts of two or more states on a federal question is a valid ground for review. *Fuller v. Oregon*, 417 U.S. 40, 42 (1974). Even in the absence of a conflict, this Court may grant the petition for certiorari where a state court has decided a substantial and

unsettled federal question arising under the Constitution or where it has rendered an erroneous or at least doubtful decision on the constitutional question. *Oregon v. Kennedy*, 456 U.S. 667, 668-69 (1982) (state court took an "overly expansive view of the Double Jeopardy Clause"); *Tibbs v. Florida*, 457 U.S. 31, 39 (1982) (certiorari granted "to review this interpretation of the Double Jeopardy Clause"); *see also Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (certiorari granted because the state court "has read *Miranda* too broadly"). It cannot be argued that there is an important need for uniformity in the interpretation of the Constitution.

Respondent's attempt to distinguish the decisions of the highest courts of various states is unavailing. It is clear that the highest courts of at least four states have held that a defendant's federal constitutional right to due process is not violated when a jury is precluded from considering evidence of voluntary intoxication in determining whether the defendant

possessed the requisite mental state. The Montana court alone has ruled to the contrary.

IV.

Respondent claims that this Court decided a similar issue in *Hopt v. People*, 104 U.S. 631 (1881), and, therefore, the issue need not be "revisited." The issue involved in *Hopt* is not similar to that presented here. Respondent concedes that the decision in *Hopt* did not rest on due process grounds. Rather, the Court simply ruled that, pursuant to a Utah statute, Hopt was entitled to an instruction that his intoxication might be taken into consideration in determining the purpose, motive, or intent with which he committed the acts in a prosecution for first degree murder. The decision in *Hopt* rests exclusively on statutory grounds and does not implicate the Due Process Clause whatsoever.

This Court has never directly addressed the constitutionality of legislative limitations on voluntary

intoxication evidence. The Montana court has decided an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

For these reasons, the reasons articulated in the petition, and the reasons set forth by the eight states who have joined Montana as amici curiae in this matter, the State of Montana requests that the writ issue.

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November 1995

IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. 93-405

STATE OF MONTANA,

Plaintiff and Respondent,

vs.

JAMES ALLEN EGELHOFF,

Defendant and Appellant.

ADDITIONAL REPLY BRIEF OF APPELLANT

On Appeal from the District Court of the
Nineteenth Judicial District of the State of Montana,
in and For the County of Lincoln

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II. § 45-2-203, M.C.A. IS UNCONSTITUTIONAL AS BEING VIOLATIVE OF THE ACCUSED'S RIGHT TO PROCEDURAL OR SUBSTANTIVE DUE PROCESS UNDER THE CONSTITUTIONS OF THE STATE OF MONTANA AND THE UNITED STATES OF AMERICA, BY PROHIBITING A JURY'S CONSIDERATION OF THE ACCUSED'S VOLUNTARY INTOXICATION IN DETERMINING HIS MENTAL STATE WHICH IS AN ELEMENT OF THE OFFENSE OF DELIBERATE HOMICIDE.

. . . .

C. *Consideration by a jury of voluntary intoxication is constitutionally required as a component of substantive due process.*

The state asserts that "voluntary intoxication is a gratuitous defense and not a constitutionally protected defense to criminal conduct." It cites several state and federal

authorities in support. When citing to other jurisdictions, the state confuses the evidence of voluntary intoxication as a *defense* (which has not historically been allowed in Montana), and the consideration of voluntary intoxication as one of the factors which the jury can consider when deliberating on whether the government has carried its burden of proving mental state. The latter, referred to by some of the commentators and courts as the "exception" to the general rule that "voluntary intoxication is not a defense," recognizes the essential constitutional rule that there must be proof by the state of the mens rea in order to establish criminal culpability. *Morissette, supra*, 342 U.S. at 250-251. Although *Morissette* construes a federal penal statute, it has been noted that the *Morissette* court went "out of its way to emphasize the important of mens rea as a prerequisite to penal liability and suggested, at least, that statutes dispensing with culpability for traditional criminal offenses would impair the constitutional

protections accorded to defendants." Jeffries, *supra*, 88 *The Yale Law Journal* at 1374 n. 144.

The state relies on the case of *State v. Souza*, 813 P.2d 1384 (Hawaii, 1991). The state characterizes the Hawaii statute as "substantially the same as Mont. Code Ann. § 45-2-203." (State's Brief at page 10, footnote 3). There is a significant difference, however, The Hawaii statute provides that,

> Evidence of self-induced intoxication of the defendant is admissible to prove or negative conduct or to prove state of mind sufficient to establish an element of the offense. Evidence of self-induced intoxication of the defendant is not admissible to negative the state of mind sufficient to establish an element of an offense.
>
> HRS § 702-2330

This language is more consistent with the use of intoxication as a *defense*, which is not the argument here. Presenting evidence to negate proof by the state is in the nature of an affirmative defense such as justification or duress. It anticipates that the state has carried its burden of proof and

that then the defense presents affirmative evidence to rebut the proof. That differs from the situation where the state, as part of its proof, must prove the requisite mens rea, which proof would necessarily, in the case of an intoxicated person, include evidence that, despite the intoxication, the defendant had the requisite mental state which is an element of the charged offense. This evidence is then considered by the jury in its deliberations. An additional qualifier when reading *Souza* is that defendant was charged with murder in the second degree, not first degree. It may be that the charging authority took Souza's intoxication into account when charging a lesser offense as there do not appear to be any other grounds for mitigation in the opinion. Thus, as in *Sage*, the effect of intoxication evidence reduces the degree of culpability. One cannot extrapolate from *Souza* that had he been charged with deliberate homicide the same result would have obtained.

The *Souza* court cited, and the state here cites *United States ex rel. Goddard v. Vaughn*, 614 F.2d 929, 935 (3rd

Cir.), cert den. 449 U.S. 844, 101 S. Ct. 127, 66 L.Ed.2d 53 (1980), and makes much of the language in *Goddard* that voluntary intoxication is a "gratuitous" defense. Again, the *Souza* court and the state confuse the use of intoxication evidence as a *defense* rather than evidence relevant to mental state. The state case out of which the federal action arose, *Goddard v. State*, 382 A.2d 238 (Del. Supr. 1977), was a prosecution for murder, rape and conspiracy. There, the defendant complained that he was the victim of impermissible burden-shifting when the court instructed the jury that defendant had the burden of proving intoxication. The statute there read, ". . . voluntary intoxication is an affirmative defense in a prosecution for a criminal offense only if it negatives the element of intentional or intentionally," *id.* at 239. The federal habeas opinion, in the 3rd Circuit, phrased the question posed as, "Once the defense of intoxication has been raised, was the prosecutor required to prove its absence?" 614 F.2d at 931. The court analyzed the cases respecting

burden-shifting, and concluded that "A gratuitous defense having been provided, it is not constitutionally perverse for the state to insist that the defendant assume the responsibility of proving his contention by a preponderance of the evidence." *Id.* at 935. There is no support in *Goddard* for the notion argued by the state in this case that evidence of voluntary intoxication cannot be considered by the jury; the only thing that can be said about *Goddard* is that the state may allow affirmative defenses, and, if they are allowed, can require the defendant to present evidence of that defense. The Third Circuit did not find unconstitutional burden-shifting because the "plaintiff's case did not rely on a presumption that the defendant was called upon to rebut," *Id.* at 936. Appellant does not agree with the state's assertion that the "gratuitous defense" language is not dictum (see State's Brief at page 10, note 2) but the assertion is irrelevant to the issue presented here, which is NOT that the State must allow a "defense" of voluntary intoxication.

The state's citations to other jurisdictions are not helpful, inasmuch as the underlying statutory schemes are not identical to that of Montana, nor do they defeat appellant's argument in any event. The Pennsylvania statute, for instance, allows consideration of voluntary intoxication in homicide cases to reduce the degree of murder, see page 21, footnote 5 to the state's Additional Brief. The state also recites that, "The State of Virginia allows the defense of voluntary intoxication only to reduce the crime of murder from first to second degree," see page 14 of the Additional Brief of Respondent. That Delaware may have eliminated the affirmative defense of voluntary intoxication (the defense discussed in *Goddard*) does not mean that it cannot be considered by the jury in a first degree murder case. Arkansas, Mississippi and Texas are also cited for the rule that voluntary intoxication is "not a defense." That is not the issue here.

Although not cited by the state, of all of the jurisdictions surveyed by this writer, Missouri most closely follows the rule urged by the state. There, "voluntary intoxication is not a defense to a criminal charge and . . . the rule does not even allow a jury to consider such intoxication on the issue of specific intent." *State v. Hegwood*, 558 S.W.2d 378, 381 (Mo.App. 1977). The court there held that "we are constitutionally bound to follow the last controlling decision of the Supreme Court of Missouri," and ruled that it was procedurally barred from considering the constitutionality of a prior case, *State v. Richardson*, 495 S.W.2d 435 (1973), as the issue had not been properly preserved for review. In *Richardson*, the court acknowledged that the Missouri rule was not that of the majority of states, but did not reject it, stating that, ". . . we decline to consider overturning a rule which goes back to 1855 and which has been reaffirmed many times since." It is clear that the Missouri rule is an anomaly, and the only rationale its longevity. Montana has, by contrast,

recognized that voluntary intoxication may be considered by the jury for years. It is an integral part of our common law.

The state urges the court to reject the rationale of *Terry v. State*, 465 N.E. 2nd 1085 (Ind. 1985). Appellant would counter that it is a correct statement of the law and, furthermore, more accurately reflects the rule which the Montana courts have followed for years. There, the Indiana Supreme Court held unconstitutional a state statute which provided:

> "(b) Voluntary intoxication is a defense only to the extent that it negates an element of an offense referred to by the phrase 'with intent to' or 'with an intention to." [I.C. § 35-41-3-5]

The court there did not rely on the historical differentiation between crimes of "specific" and "general" intent. Rather, the court analogized the effect of voluntary intoxication to that of mental illness, holding that a defendant could offer a defense of voluntary intoxication to *any* crime, 465 N.E.2d at 1088.

In *Terry*, the crime charged was attempted murder. The state contended that because the murder statute did not contain the words "with intent to" or "with an intention to," then the defendant was not entitled to an instruction on the effect of voluntary intoxication on mens rea. 465 N.E.2d at 1087.

The *Terry* court rejected this reasoning, held that the statute was void and without effect and stated that, "A defendant in Indiana can offer a defense of voluntary intoxication to any crime." It based its decision on the language of any earlier concurring opinion, in which the writer concluded that the statute would be unconstitutional, *Sills v. State*, 463 N.E.2d 228 (1984). The murder statute in Indiana recited, in part:

"A person who:

(1) Knowingly or intentionally kills another human being; . . . ." IC § 35-42-1-1 (1)

In the *Sills* concurring opinion, 463 N.E.2d at 242, Justice Givan recited:

> "The murder statute clearly requires an intentional act on the part of the perpetrator. To interpret the statute to require the specific language that is contained in the quotes of the statute is to make the statute ludicrous indeed.
>
> . . . .
>
> This brings us to the proposition in the case at hand where the majority holds that intoxication is a defense only in cases where the phrases 'with intent to' or 'with an intention to' appear in the statute. Although this is the exact language of the statute above quoted, it poses an impossible situation in criminal jurisprudence. In order to form intent in any event the perpetrator must be acting consciously and competently. Any situation which renders the perpetrator incapable of forming intent frees him from the responsibility of this acts.
>
> . . . .
>
> If a completely *non compos mentis* inmate of a mental hospital managed to escape his guards, acquire a motor vehicle and speed into the traffic of the city, thereby violating one or more traffic laws, he of course could not be prosecuted because he is *non compos mentis*, not only incapable of forming the

> intent to commit the act whether it be an act of *malum in se* or *malum prohibitum*.
>
> Likewise, if intoxication, whether it be voluntary or involuntary, renders that individual so completely *non compos mentis* that he has no ability to form intent, then under our constitution and under the firmly established principles of the *mens rea* required in criminal law, he cannot be held accountable for his actions, no matter how grave or how inconsequential they may be.

The *Terry* court concluded that

> Any factor which serves as a denial of the existence of *mens rea* must be considered by a trier of fact before a guilty finding is entered. Historically, facts such as age, mental condition, mistake or intoxication have been offered to negate the capacity to formulate intent. The attempt by the legislature to remove the factor of voluntary intoxication, except in limited situations, goes against this firmly ingrained principle. We thus hold Ind. Code § 35-41-3-5(b) is void and without effect.
>
> 465 N.E.2d at 1088.

As conceded by the state, the majority of jurisdictions do allow the evidence of intoxication, even where voluntarily induced, either as a "defense" or to considered when

determining mental state. The *Terry* decision simply reiterates the substantive due process rationale for the rule that most courts have honored, and which the Montana law enforced until 1987.

D. The amendment of the statute lessened or negated the state's burden of proof.

In its opening brief, appellant cited authority for the proposition that it is unconstitutional to dispense with the state's burden to prove mens rea. This argument is based on the practical reality that the burden of proof is lessened when the defendant is voluntarily intoxicated but yet the jury cannot consider that evidence; they must, perforce, base their deliberations on only some, but not all, evidence of defendant's mental state. *Morissette v. United States*, 342 U.S. 246 (1952), *In re Winship*, 397 U.S. 358, 364 (1970), *Sandstrom v. Montana*, 442 U.S. 510 (1978).

The state repeatedly claims that appellant had the opportunity to rebut the state's proof of means rea, but does

not say how. Quoting *Souza*, the state declares that appellant could still have attempted to convince the jury that he did not act "purposely" or "knowingly," nor was the state relieved of the burden of establishing the requisite mens rea. The practical effect of this is ludicrous. How does a defendant with a .36 blood alcohol level attempt to convince a jury he did not act "purposely" or "knowingly" without resort to evidence of his intoxication? Nor need the court fear that allowing the proof dictates the result: the jury may reject it. And, each case must turn on its individual facts, and if there is no credible evidence of intoxication, the trial court is certainly able to exclude reference to it under standard rules of evidence. But to disallow its consideration entirely denies substantive due process.

(12)

No. 95-566

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

JAMES ALLEN EGELHOFF,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

---

BRIEF OF THE STATES OF DELAWARE, ALASKA, ARKANSAS, HAWAII, KANSAS, MISSOURI, OKLAHOMA AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE

The amici curiae States, through their respective Attorneys General, submit the following brief pursuant to Supreme Court Rule 37. The amici curiae States administer criminal justice systems within their jurisdictions to promote the safety and welfare of their citizens. The holding of the Supreme Court of Montana construes the Due Process Clause of the Fifth Amendment, which is applicable to all states through the Fourteenth Amendment. The holding directly conflicts with decisions from other states. It also incorrectly interprets the decisions of this Court, thereby threatening to limit the ability of States to declare, as a matter of public policy, that persons who commit crimes while voluntarily intoxicated may be held responsible for their criminal conduct, despite their intoxication.

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SUMMARY OF ARGUMENT

The Montana Supreme Court construes the Due Process Clause to guarantee a criminal defendant an absolute right to present and have the jury consider evidence of voluntary intoxication in order to rebut the State's evidence regarding mental state. That reading of the Due Process Clause assumes that the State's burden of proof is somehow relieved as to the element of mental intent if the jury cannot consider evidence of voluntary intoxication when determining whether the defendant acted "purposely" or "knowingly." The state court, however, incorrectly analyzed the due process issue. The statute in question does not affect the State's burden of proof as to any element of the offense charged. Instead, the statute simply makes evidence of voluntary intoxication irrelevant to a determination of mental state which is an element of the crime. This is a legitimate exercise of the State's authority to define criminal offenses and adopt rules governing the presentation of evidence.

The critical issue is whether States may, consistent with the Due Process Clause, preclude the use of voluntary intoxication evidence to negate mental state as a matter of public policy. A number of States have considered this issue and have concluded that evidentiary restrictions on the use of voluntary intoxication evidence do not violate due process. This Court has never addressed the issue directly, although in prior decisions the Court has traditionally deferred to the States in defining offenses and adopting evidentiary rules. Only in the most exceptional circumstances has this Court tempered the States' authority in this regard on the basis of the Due Process Clause.

The state court's failure to consider these points elevates the Respondent's due process right to defend to a new constitutional standard. In addition, the decision portends an unreasonable limit on the State's authority to adopt rules and procedures regarding the presentation of evidence. In these respects, the ruling goes beyond this Court's decisions which

have considered these competing interests in other contexts. Because the Court has never addressed the constitutionality of legislative limitations on voluntary intoxication evidence, and because of the disparity in the treatment of the issue by the various states, this Court's guidance is necessary.

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REASONS FOR GRANTING THE WRIT

I. The States, as a Matter of Public Policy, May Make Irrelevant Evidence of Voluntary Intoxication.

The Montana legislature, as have other state legislatures,[1] has eliminated voluntary intoxication as a defense to criminal conduct and has made evidence of

[1] *State v. Ramos*, 648 P.2d 119 (Ariz. 1982) (Ariz. Rev. Stat. Ann. § 13-503 (1980), *see also* § 13-503 (1993)); *White v. State*, 717 S.W.2d 784 (Ark. 1986) (Ark. Code Ann. § 5-2-207 (Repl. 1993)), *see also Pharo v. State*, 783 S.W.2d 64 (Ark. Ct. App. 1990); *Wyant v. State*, 519 A.2d 649 (Del. 1986) (Del. Code Ann. tit. 11, § 421 (Repl. 1987)); *Foster v. State*, 374 S.E.2d 188, 194-95 (Ga. 1988), *cert. denied*, 490 U.S. 1085 (1989) (Ga. Code Ann. § 16-3-4 (1968)); *State v. Souza*, 813 P.2d 1384 (Haw. 1991) (Haw. Rev. Stat. § 702-230 (1986)); *Lanier v. State*, 533 So. 2d 473 (Miss. 1988); *State v. Erwin*, 848 S.W.2d 476 (Mo. 1993), *cert. denied*, 114 S. Ct. 88 (1994) (Mo. Rev. Stat. § 562.076 (1983)); *Commonwealth v. Rumsey*, 454 A.2d 1121 (Pa. Super. 1983) (18 Pa. Cons. Stat. Ann. tit. 18, § 308 (Purdon 1976)); *State v. Vaughn*, 232 S.E.2d 328 (S.C. 1977); *Hawkins v. State*, 605 S.W.2d 586 (Tex. Crim. App. 1980) (Tex. Penal Code Ann. § 8.04 (Vernon 1974)).

voluntary intoxication irrelevant for purposes of establishing the defendant's mental state. Resolving the question of the degree of criminal responsibility to be borne by intoxicated offenders,[2] these states have decided that the balance underlying the "specific intent, general intent" rule[3] fails to respond to the dangers of the intoxicated actor and underestimates the evidentiary problems in establishing the subjective state of mind of the drunken offender. Recognizing that alcohol and drug intoxication are factors involved in a

[2] *See Abruska v. State*, 705 P.2d 1261, 1265 (Alaska App. 1985); *People v. Rocha*, 479 P.2d 372, 375-76 (Cal. 1971); *People v. Hood*, 462 P.2d 370, 377-79 (Cal. 1969).

[3] Under common law, voluntary intoxication was not a defense in a criminal prosecution, even though the intoxication had prevented the defendant from understanding his actions, having the required culpable mental state, or remembering the events. *See generally United States ex rel. Goddard v. Vaughn*, 614 F.2d 929, 934-35 & nn.5-7 (3d Cir. 1980). In the nineteenth century, the courts, in an effort to mitigate the common law rule, crafted a new rule, allowing evidence of voluntary intoxication to negate the required mental state in "specific intent" crimes, but making the evidence inadmissible for "general intent" crimes. *See generally* Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045, 1046-49 (1944); Paulsen, *Intoxication as a Defense to Crime*, 1961 U. Ill. L.F. 1, 10-11.

substantial number of crimes,[4] those legislatures tie together three policy strands to resurrect the common law approach and make voluntary intoxication inadmissible to negate any level of culpability. Initially, those bodies determine that the prevalence of alcohol's contribution to crime requires, for purposes of general deterrence, a substantial relaxation of the "normal" culpability requirements.

> This course [specific intent, general intent rule] thus undermines the criminal law's primary function of protecting society from the results of behavior that endangers the public safety. This should be our guide rather than concern with logical consistency in terms of any single theory of culpability, particularly in view of the fact that alcohol is significantly involved in a substantial number of offenses. The demands of public safety and the harm done are identical irrespective of the offender's reduced ability to restrain himself due to his drinking.

State v. Stasio, 396 A.2d 1129, 1134 (N.J. 1979) (footnotes omitted). Those legislatures surmise that, regardless of the

[4] *See Rumsey*, 454 A.2d at 1124; Note, *Alcohol Abuse and the Law*, 94 Harv. L. Rev. 1660, 1681-82 (1981); Note, *Intoxication as a Criminal Defense*, 55 Colum. L. Rev. 1210, 1210 & n.1 (1955).

culpable mental state required of the sober actor, "if a person casts off the restraints of reason and consciousness by a voluntary act, no wrong is done to him if he is held accountable for any crimes which he may commit in that condition. Society is entitled to this protection." *McDaniel v. State*, 356 So. 2d 1151, 1160-61 (Miss. 1978). *See* Note, *Intoxication as a Defense to a Criminal Charge in Pennsylvania -- Sequel*, 76 Dick. L. Rev. 324, 331 (1976) (deterrence approach "reflects the old view that voluntary intoxication is such a dangerous vice that public order and discipline require that defendants should not be permitted to set it up as a defense").

In short, the traditional model of subjective culpability as a requisite for criminal responsibility is, in cases involving a drunken actor, subordinated to a more objective model motivated by utilitarian concerns of general deterrence.[5] Such a transformation is supported by the well-accepted principle

[5] *See* Note, 55 Colum. L. Rev. at 1217.

that only in the rarest case will intoxication preclude the highest culpable states of "intention" or "purpose" or the minimal requirements of conscious cognition and effect required for "knowledge." *Stasio*, 396 A.2d at 1134.[6] Finally, those legislatures conclude that allowing intoxication evidence runs the unacceptable risk of potential manipulation by defendants and will lead to confusion of the jury who may not adequately appreciate that intoxication evidence is to be used for the question of mental state, not for purposes of showing an excuse.[7]

The Constitution does not require the States to structure their criminal codes on a model of liability relying

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[6] "The great majority of moderately to grossly drunk or drugged persons who commit putatively criminal acts are probably aware of what they are doing and the likely consequences. In the case of those who are drunk, alcohol may have diminished their perceptions, released their inhibitions, and clouded their reasoning, but they still have sufficient capacity for the conscious mental processes required by the ordinary definitions of all or most specific mens rea crimes." Murphy, *Has Pennsylvania Found a Satisfactory Intoxication Defense?*, 81 Dick. L. Rev. 199, 208 (1977).

[7] Murphy, 81 Dick. L. Rev. at 203 (citing *Commonwealth v. Graves*, 334 A.2d 661, 667 (Pa. 1975) (Eagen, J., dissenting)), 208. *See* Note, 76 Dick. L. Rev. at 331.

on the subjective culpability of the offender. On the basis of general deterrence, a State may, when the offender stands in a position of responsibility for the resulting events and the ensuing harm is great, impose criminal responsibility without demonstrating any culpable mental state of the actor toward the harm. *United States v. Park*, 421 U.S. 658, 670-73 (1975); *United States v. Dotterweich*, 320 U.S. 277, 281, 285 (1943). Given the constitutional latitude of the States to define offenses, one federal appeals court has described the defense of voluntary intoxication to be a "gratuitous" defense. *United States ex rel. Goddard v. Vaughn*, 614 F.2d 929, 935 (3d Cir. 1980). Similarly, this Court has allowed the States to impose upon the defendant the burden of proving insanity, *Rivera v. Delaware*, 429 U.S. 877 (1976) (dismissing appeal for want of substantial federal question), or extreme emotional distress, *Patterson v. New York*, 432 U.S. 197 (1977), even though the respective defenses went to the accused's mental state. Given the "gratuitous" nature of voluntary intoxication

as a defense, the States can define the culpable mental state for an offense without regard to the offender's intoxication. That some states have instead chosen to allow evidence of intoxication to be admissible does not make constitutionally infirm the public policy decision of those states that have chosen to make the evidence inadmissible. *McMillan v. Pennsylvania*, 477 U.S. 79, 90 (1986).

The principle underlying *In re Winship*, 397 U.S. 358 (1970), requires only that if a State defines the crime to include an element, the State must prove that element beyond a reasonable doubt. *Martin v. Ohio*, 480 U.S. 228, 233 (1987); *Patterson*, 432 U.S. at 205-06, 208-09; *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975). When the defense is eliminated entirely by the legislature when defining the offense, the *Winship* doctrine simply does not apply. The *Winship* cases also do not require the States, as a matter of federal due process, to offer a particular defense or to define a crime in any particular manner. Indeed, the Court in

Patterson expressly disclaimed such an expansive reach of the Due Process Clause. 432 U.S. at 214-15 n.15.

The decision of the Montana Supreme Court calls into question the authority of the States to determine who can be held criminally responsible for their actions and to declare, in the process, that some evidence is irrelevant in assessing culpability. This Court should grant review to clarify the authority of the States to enact such laws.

II. The Montana Supreme Court's Decision Conflicts With This Court's Rulings and Threatens to Limit the State's Ability to Define Offenses and Adopt Evidentiary Rules.

Just as the States have considerable freedom in defining criminal offenses, the States also have substantial discretion in adopting rules and procedures governing the presentation of evidence. *See Michigan v. Lucas*, 111 S. Ct. 1743, 1746 (1991) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973)); *Rock v. Arkansas*, 483 U.S. 44, 55 n.11 (1987); *Ohio v. Roberts*, 448 U.S. 56, 62-64 (1980). In this

respect, a defendant's right to present evidence or otherwise rebut the prosecution's case is not without limitation. Evidence otherwise relevant to mental state is routinely excluded in accordance with rules designed to assure both fairness and reliability in the ascertainment of guilt or innocence. It is only where application of a State's evidentiary rule so substantially interferes with the accused's ability to present a defense or cross-examine witnesses so as to impair the truth-seeking function of the trial that the Due Process Clause has been implicated.

The landmark case in this regard is *Chambers*. The defendant there was tried for a murder to which another man had repeatedly confessed in the presence of acquaintances. Mississippi's hearsay rule, coupled with a "voucher" rule that did not allow Chambers to cross-examine the confessed murderer directly, prevented Chambers from introducing testimony regarding these confessions, which were critical to

his defense that another man had committed the crime.[8] This Court held that strict application of the State's evidentiary rules denied Chambers a fair trial because the "integrity of the factfinding process" itself was called into question. 410 U.S. at 295. In reversing Chambers' conviction, however, this Court was careful to note:

> In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.

Id. at 302-03.

The Montana Supreme Court cited *Chambers* as authority for the sweeping proposition that ***any*** interference with a defendant's presentation of voluntary intoxication evidence to rebut the prosecution's allegations violates due

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[8] Mississippi recognized a hearsay exception for declarations against interest, but applied it only to declarations against pecuniary interest, not declarations against penal interest. *Chambers*, 410 U.S. at 299.

process, without considering the State's legitimate interest in limiting the use of such evidence. This result extends the protections of the Due Process Clause far beyond that which was intended by this Court in *Chambers* and seriously threatens the State's ability to define criminal culpability or to impose evidentiary restrictions as a matter of public policy.

This Court has not considered the constitutionality of legislative restrictions on voluntary intoxication evidence in light of *Chambers*. The fact that a number of States now restrict significantly the use of such evidence warrants this Court's guidance, especially since voluntary intoxication as it pertains to criminal responsibility has strong policy implications. Unlike the archaic rules at issue in *Chambers*, rules which limit the use of voluntary intoxication evidence reflect valid contemporary concerns regarding criminal responsibility. These rules do not have the same effect of wholly depriving an accused of a valid defense; rather, they simply prevent the defendant from relying upon the fact of his

drunkenness to negate mental state. Given the public policy reasons behind the exclusion of evidence of voluntary intoxication, *Chambers* cannot be construed as guaranteeing a fundamental right to rely on voluntary intoxication as a defense. This case thus presents an opportunity for the Court to clarify the extent to which *Chambers* affects the States' ability to limit certain evidence on policy grounds.

Restricting voluntary intoxication evidence is only one example of legislative policy which could potentially be affected by the Montana Supreme Court's ruling. Most States have adopted a rape-shield statute similar to Fed. R. Evid. 412, prohibiting evidence of a victim's past sexual conduct when consent is at issue. The purpose of these statutes is to encourage rape victims to report crimes, to exclude questionable evidence used to impeach rape complainants, and to end the practice of putting the victim on trial. Wayman, *Lucas Comes to Visit Iowa: Balancing Interests Under Iowa's*

Rape-Shield Evidentiary Rule, 77 Iowa L. Rev. 865, 872 (1992).

Despite the obvious limitations such a rule imposes on a defendant's ability to present a defense, rape-shield statutes have never been declared unconstitutional under the Due Process Clause.[9] Under the Montana Supreme Court's analysis, however, a rape-shield statute such as Fed. R. Evid. 412 would be vulnerable to constitutional attack. Under the reading of *Chambers* by the Montana Supreme Court, the accused's right to defend is declared absolute, a result which threatens any kind of evidentiary restrictions imposed by the state. Given the potential far-reaching effect of the decision

[9] In *Lucas*, the Court considered a constitutional challenge to Michigan's rape-shield statute which required the defendant to give notice prior to introducing a complainant's past sexual conduct with the defendant. It held that failure to comply with the notice requirements could, in some instances, justify the severe penalty of precluding evidence. 111 S. Ct. at 1748. The Court did not decide whether preclusion of such evidence would violate the defendant's Sixth Amendment rights in that particular case, choosing instead to leave that determination to the state court. *Id.* ("We leave it to the Michigan courts to address in the first instance whether Michigan's rape-shield statute authorizes preclusion and whether, on the facts of this case, preclusion violated Lucas' rights under the Sixth Amendment.")

below, the Court should offer its guidance in defining how far States can go in limiting a defendant's ability to present evidence in his defense.

CONCLUSION

For the foregoing reasons, amici respectfully request that the petition for a writ of certiorari be granted.

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43 P

QUESTION PRESENTED

Is a criminal defendant deprived of due process under the Fourteenth Amendment to the United States Constitution when a jury is instructed, pursuant to a state statute, that the jury may not consider evidence of the defendant's voluntary intoxication in determining the existence of a mental state which is an element of the criminal offense?

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OPINION BELOW

The opinion of the Montana Supreme Court is reported at *State v. Egelhoff*, 900 P.2d 260 (Mont. 1995). (Pet. App. 1a-26a.)

JURISDICTION

The state court opinion was filed on July 6, 1995. (Pet. App. 1a-26a.) The petition for certiorari was filed on October 4, 1995 and certiorari was granted on December 8, 1995. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Mont. Code Ann. § 45-2-203 (1995):

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition.

Mont. Code Ann. § 45-5-102(1)(a) (1995):

> A person commits the offense of deliberate homicide if: (a) he purposely or knowingly causes the death of another human being . . .

Mont. Code Ann. § 45-2-101(34) (1995):

> "Knowingly" – a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is aware of the person's own conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person's conduct. When knowledge of the existence of a particular fact is an element of an offense, knowledge is established if a person is aware of a high probability of its existence. Equivalent terms, such as "knowing" or "with knowledge", have the same meaning.

Mont. Code Ann. § 45-2-101(63) (1995):

> "Purposely" – a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is the person's conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although the purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms, such as "purpose" and "with the purpose", have the same meaning.

STATEMENT OF THE CASE

Respondent James Allen Egelhoff was charged by information and convicted by a jury on two counts of deliberate homicide in violation of Mont. Code Ann. § 45-5-102 (1995) in the shooting deaths of Roberta Pavola and John Christianson. (J.A. 10-12.) To convict on a charge of deliberate homicide, under Montana law, the State must prove that the defendant "purposely" or "knowingly" caused the death of another human being. (Pet. App. 28a, 29a.) Egelhoff was sentenced to 40 years in the Montana State Prison and two years for the use of a firearm as to each count, to be served consecutively, for a total of 84 years' imprisonment. (J.A. 33-37.)

A. Testimony Presented at Trial

In July 1992, Egelhoff traveled to the Yaak area near Troy in Lincoln County, Montana, to pick mushrooms. While there, Egelhoff became acquainted with the victims, Roberta Pavola and John Christianson, who were also in the Yaak area to pick mushrooms. (Tr. at 644-47, 1109-10.) Egelhoff had with him only a blanket, a .38 caliber handgun, a holster in which he carried the gun, and a box of .38 caliber shells. (Tr. at 648-50, 1115-16, 1122, 1135-36.)

On Sunday, July 12, 1992, Egelhoff, Pavola and Christianson rode together in Christianson's old, blue, four-

door station wagon to sell the mushrooms they had picked the day before. (Tr. at 656-57.) They then bought a case of beer and, around noon that day, went to a party at the "Pink Apartments" in Troy. (Tr. at 569-60.) As they were heading into Troy, Egelhoff took the handgun and holster off his hip, handed it to Pavola and asked her to put it in the glove box. Pavola did as she was requested. (Tr. at 669, 1123.) The trio spent most of the day drinking at the party and in bars. (Tr. at 660-61, 1127.)

Pavola, Christianson and Egelhoff left the party shortly after dusk on July 12 and drove away in Christianson's station wagon. (Tr. at 669, 1137-38.) Christianson was driving, Pavola was on the front passenger side and Egelhoff was behind Pavola. (Tr. at 673.)

Egelhoff and Christianson were later seen at about 9:20 p.m. when they bought beer and cigarettes. While Christianson appeared to have been drinking, Egelhoff did not seem intoxicated. He spoke well and did not slur his words. (Tr. at 975-77, 982.)

Later that evening Christianson's station wagon was seen being driven very erratically on old Highway 2 in the area of the KOA Campground. The car veered off the left side of the road into a ditch and stopped. (Tr. at 906.) A motorist stopped on the right side of the road, exited his car, crossed the highway and approached the station wagon. (Tr. at 906-07.) At a distance of less than 20 feet, he saw three people in the car: a driver, a passenger in the front seat and a person in the back seat positioned between the two people in the front seat. (Tr. at 907-09.) He thought the person in the front passenger side was probably injured because he or she did not move and did

not make any noise. (Tr. at 909-10.) The person in the back seat, who was male, was shouting obscenities. He told the witness that no one was hurt and to "get the hell out of there." (Tr. at 910-11.) Christianson's vehicle immediately began to move forcefully forward and backward several times, crashing into the brush and a tree in an attempt to turn the automobile around and get it out of the ditch. The motor was then gunned. The witness testified that he was "scared to death" and decided quickly to leave the area for his own safety. (Tr. at 911-13.)

Another witness testified that he drove on old Highway 2 near the KOA Campground on July 12 and 13. He did not notice anything on that road on July 12, but on the morning of July 13, he saw small square chunks of glass in the middle of the road that appeared to have come from a car window. (Tr. at 570-72.)

At approximately midnight on July 13, another witness was driving on new Highway 2 when she noticed a damaged guardrail and debris lying on the road and a slow-moving blue station wagon that looked as though it had crashed into the guardrail. The witness exited her car and tried to flag down the station wagon. The station wagon, however, revved its engine, went into the other lane and around the witness and then entered the ditch on the right side of the road. The station wagon's engine then raced and the car rocked back and forth, trying unsuccessfully to exit the ditch. (Tr. at 282-83, 285, 287-88, 290-92, 300.)

The witness approached the station wagon and called out to its occupants. Egelhoff was sitting in the back of the car and responded by shouting something about his

hands. The witness looked inside the car and saw a man in the back and someone in the front seat, near the center of the seat but slumped toward the passenger's side. She asked the man in the back if he was okay and he responded with a profane expression indicating that he was not alright. Egelhoff did, however, respond to the questions the motorist asked him. The witness attempted to open the driver's side door but was required first to remove a big stick which was protruding out of the window and unlock the door. The witness testified that she thought that the big stick had been used from the back seat to press the gas pedal when the car was attempting to exit the ditch. (Tr. at 301-05, 315, 335, 337-40, 424, 426.)

An ambulance attendant found Egelhoff in the back of the car lying on his right side with his head toward the rear end of the car. When she rolled Egelhoff over to place him on the backboard, she noticed that he was wearing a holster on the back center part of his belt. (Tr. at 520-21, 525, 528.) As the ambulance left, Egelhoff kept yelling and trying to sit up. He suddenly became very profane and screamed that he wanted to get out. He became very violent and hit two ambulance attendants. Egelhoff then told one of the ambulance attendants that he was going to kill him. (Tr. at 478-79, 483-87.) The ambulance attendant testified that Egelhoff was the most violent person with whom he had ever dealt. (Tr. at 488-89, 492, 507.)

Egelhoff was taken to a hospital. A sheriff's department detective arrived at the hospital at approximately 1 a.m. on July 13 and observed Egelhoff there for approximately five or six hours. Egelhoff was very strong and

combative throughout the entire time the detective was at the hospital. At one point, he observed another detective attempt to take a photograph of Egelhoff while Egelhoff was on his back. Egelhoff looked directly at the detective and, with apparent planning and extreme accuracy, pulled back his leg and hit the camera exactly with the flat of his foot, knocking the camera to the floor. The detective who had attempted to take the photograph thought Egelhoff's coordination was quite good and was surprised to learn that Egelhoff's blood alcohol level was .36. (Tr. at 701, 839, 849.)

A search of the blue station wagon revealed Egelhoff's tennis shoe underneath the steering wheel on the floorboard. Egelhoff's revolver was found on the floorboard of the station wagon near the brake pedal on the driver's side. (Tr. at 558.) The revolver contained four live rounds and two empty casings. One empty casing was found directly under the firing pin in line with the barrel, and the other empty casing was found to the right of the barrel. When Egelhoff's gun was cocked, the cylinder turned clockwise. This was consistent with the way the bullets and empty casings were situated in Egelhoff's gun if they had been shot in sequence. (Tr. at 608-10.)

Atomic absorption swabs were taken from Egelhoff's hands to determine if there were any chemicals or powders on his hands which would indicate that he had fired a gun. Test results were consistent with Egelhoff shooting a gun holding it in his left hand or in both hands. (Tr. at 386-88, 390, 409.) A firearm expert testified that bullet fragments removed from Christianson could have come from Egelhoff's gun (Tr. at 93, 95-96), but bullet fragments

removed from Pavola were too small to identify as coming from any particular weapon. (Tr. at 102.)

The medical examiner determined that Pavola and Christianson each died from one gunshot wound to the head. Pavola had been shot in the left temple area and the bullet, which was never found, exited on the right side of the back of Pavola's head. Skull fragments were missing from the area of the exit wound. (Tr. at 155-57, 160, 163, 165.) Christianson was shot in the right back side of his head. (Tr. at 169.)

The medical examiner examined three bone fragments which had been found with a large amount of shattered glass in the middle of the road on old Highway 2. He determined that they were skull fragments and that all three fragments contained material that appeared to be lead. (Tr. at 179-81.) In the medical examiner's opinion, neither of the victims' gunshot wounds was consistent with suicide. (Tr. at 182.) Blood stains found on Egelhoff's pants and T-shirt were consistent with Christianson's and Pavola's blood. (Tr. at 240-41, 245-47, 248-50, 845.) The prosecution's evidence at trial was thus overwhelming that Egelhoff had murdered Christianson and Pavola.

B. Defense Testimony at Trial

Egelhoff testified that he did not remember much of what occurred on the evening of July 12, 1992. His last clear memory on that date was his presence at the Pink Apartments when there was still daylight. He stated he did not remember leaving the apartments, being in the station wagon, shooting the gun, or kicking the detective

with the camera. The only memory he had after leaving the party was that the station wagon was parked somewhere and he and Christianson were sitting outdoors, passing the bottle of "Black Velvet" back and forth. (Tr. at 1127-30, 1132, 1136-38.) Egelhoff presented evidence regarding his intoxication and contended that his level of intoxication precluded him from undertaking the physical tasks necessary to have committed the homicides. As such, he asserted that an unidentified fourth person must have committed the crimes. He also claimed he suffered from an alcoholic blackout which prevented him from recalling the events of the night in question. All evidence of Egelhoff's intoxication was admitted on the issues of physical incapacity and lack of memory. Egelhoff did not contend he lacked the requisite intent to commit the murders; his defense was that he had not committed the crimes.

C. Jury Instructions

The district court instructed the jury pursuant to Mont. Code Ann. § 45-2-203 (1995) as follows:

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed the substance causing the condition.

(Jury Instr. No. 11; Pet. App. 29a.) Thus, the voluntary intoxication evidence was admissible, as offered by

Egelhoff, to show Egelhoff's physical inability to commit the crimes and to explain why he could not provide any details concerning his alleged "fourth person" defense. However, pursuant to § 45-2-203, the evidence could not be considered by the jury as to whether he "knowingly" or "purposely" committed the alleged crimes.

The district court instructed the jury that the State retained the burden of proof, beyond a reasonable doubt, as to all the elements of the offenses, including the mental state requirement of having acted knowingly or purposely. (Pet. App. 30a.) The district court further instructed the jury that the State has the burden of proving guilt of the defendant beyond a reasonable doubt and that the defendant is presumed to be innocent of the charges against him. The jury was told that this presumption is not overcome unless, from all the evidence in the case, the jury is convinced beyond a reasonable doubt that the defendant is guilty. The jury additionally was told that the instructions were to be read as a whole, and that the defendant is not required to prove his innocence. (Pet. App. 27a-28a; J.A. 13-14.)

Egelhoff objected to the intoxication instruction on federal constitutional grounds, arguing that § 45-2-203 was unconstitutional because it shifted the burden from the State to him with respect to the required mens rea by lowering the required mental state for those who are voluntarily intoxicated. (Tr. 1158-59, J.A. 38-39.) Egelhoff repeated the argument in his posttrial motion for a new trial. (J.A. 15-19.)

D. The Decision of the Montana Supreme Court

Egelhoff appealed his conviction to the Montana Supreme Court, claiming that § 45-2-203 is unconstitutional because it has the effect of negating the requirement that the State prove that the defendant acted knowingly or purposely which is an element of deliberate homicide. Relying upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution and this Court's decisions interpreting that provision, the Montana Supreme Court declared § 45-2-203 unconstitutional and reversed the convictions. In doing so, the Montana Supreme Court stated that since the jury was not allowed to consider evidence of voluntary intoxication on the element of Egelhoff's mental state, the State's burden of proof beyond a reasonable doubt on that element was reduced, in violation of the Court's ruling in *In re Winship*, 397 U.S. 358, 364 (1970). (Pet. App. 10a, 12a, 14a.) The Montana court cited *Chambers v. Mississippi*, 410 U.S. 284 (1973), in stating that, due to § 45-2-203, Egelhoff was denied the right to a fair opportunity to defend against the State's accusations (Pet. App. 12a). The state court also relied upon *Martin v. Ohio*, 480 U.S. 228 (1987), for the proposition that a court may not constitutionally disallow admission of evidence of voluntary intoxication during trial and may not prevent consideration of that evidence by the jury in determining whether Egelhoff possessed the requisite knowledge or purpose. (Pet. App. 12a-14a.)

SUMMARY OF ARGUMENT

There is no problem concerning the criminal laws that vexes policymakers more than the proper method of dealing with the use of alcohol or drugs in connection with the commission of a crime. It is well documented that an enormous number of crimes are committed by individuals under the influence of some judgment-impairing substance. The problem posed by alcohol in particular is its widespread use by individuals who may have no proclivity to commit crimes when sober, but act lawlessly when they are in an alcohol-impaired condition. The issue posed in this case is whether the Montana legislature's particular solution to this unquestioned problem comports with the Due Process Clause of the Fourteenth Amendment.

In 1987 the Montana legislature responded to these changing attitudes and values by amending Mont. Code Ann. § 45-2-203 (1995) to limit more stringently the use of intoxication as grounds for exculpation from criminal liability. As amended, the statute not only precludes use of intoxication as an affirmative defense to criminal liability but also assigns no exculpatory value to voluntary intoxication for purposes of determining whether any required mental state is present. The law, however, does not preclude consideration of intoxication for other purposes to the extent material to assessing criminal liability, including whether a defendant was incapable of performing the conduct with which he is charged. That § 45-2-203 reflects a commonsense approach to the problem of intoxicated defendants is not in question; that it is a constitutionally acceptable approach is reflected both in the refusal of common law courts to allow intoxication to

serve exculpatory ends and by this Court's decisions recognizing the broad discretion possessed by States to determine the circumstances under which conduct will give rise to criminal liability.

At common law, a voluntarily intoxicated person was not permitted to take advantage of his or her condition as a basis for escaping criminal responsibility. This common law practice has been modified in many States over the course of time, but the vast majority of States still restrict in some fashion the ability of defendants to avoid criminal responsibility on the grounds of intoxication. Montana and at least nine other States, moreover, follow the common law rule vigorously by precluding a defendant from reliance on voluntary intoxication not merely as an affirmative defense but also to negate the existence of any mental state required for conviction. This Court has recognized that common law traditions have substantial relevance in determining the scope of the Due Process Clause of the Fourteenth Amendment. Substantive criminal laws consistent with those traditions rarely, if ever, can offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 202 (1977). Montana's refusal to permit a defendant to hide behind voluntary intoxication to avoid criminal responsibility for deliberate homicide clearly does not infringe any principle this Court could describe fairly as "fundamental."

Finally, § 45-2-203 does not exceed any of the due process bounds established by the Court. Montana's statute does not create a presumption of guilt, does not shift the burden of proof on any element of the crime, and

does not deny a defendant the opportunity to show he is actually innocent of the crime charged. For purposes relevant here, § 45-2-203 only bars a defendant from escaping criminal responsibility, to the extent mental state is dispositive, simply because he was voluntarily intoxicated. As such, it falls squarely within the range of state authority the Court repeatedly has held to be unencumbered by federal due process constraints.

ARGUMENT

A. Section 45-2-203 Establishes a Generally Applicable Standard of Criminal Liability for Intoxicated Persons Under Which No Exculpatory Value May Be Assigned to Voluntary Intoxication for Purposes of Determining Mental State and Is Supported by Important Policy Considerations.

1. In Montana's 1973 criminal law recodification, the state legislature adopted a criminal responsibility statute providing that

> [a] person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him or [sic] his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. An intoxicated or drugged condition may be taken into consideration in determining the existence of a mental state which is an element of the offense.

1973 Mont. Laws ch. 513, § 1. The statute was substantively unmodified until 1987 when the current law was enacted. 1987 Mont. Laws ch. 251, § 1 (codified at Mont. Code Ann. § 45-2-203 (1995)). The current statute reads:

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition.

While, as the concurring opinions of Chief Justice Turnage and Justice Nelson indicate (Pet. App. 21a, 22a), the principal change between the provisions was elimination of a defendant's right to offer evidence of intoxication to negative the prosecution's mental state proof, a somewhat more detailed analysis of § 45-2-203 is necessary to frame the due process issue involved here.

The intoxication statute consists of four separate but related parts. The first is the opening clause which makes a defendant "criminally responsible" for his conduct. The Montana Supreme Court definitively interpreted this clause in *Kills On Top v. State*, 901 P.2d 1368 (Mont. 1995). It rejected there a claim that the first clause "mandates that a jury find a defendant guilty of the charged crime if the jury finds that the defendant was intoxicated" because, "[e]ven if the jury found that [the defendant] was intoxicated, under the instructions as a whole, the State still had to prove each of the elements of the crime

in order to establish criminal responsibility." *Id.* at 1380; *see also State v. Byers*, 861 P.2d 860, 875 (Mont. 1993), *overruled in part, State v. Egelhoff*, 900 P.2d at 267 (rejecting contention that intoxication instruction "relieved the State of the burden of proving beyond a reasonable doubt all of the elements of the offense"). The first clause accordingly represents a general statement of legislative intent to remove intoxication as a ground for negativing a defendant's criminal responsibility.

The second and third parts of the provision specify, respectively, that intoxication is not a "defense" to any crime and that it may not be considered in determining whether the requisite mental state exists. The term "defense" in § 45-2-203 has not been construed by the Montana Supreme Court, but it plainly refers to use of intoxication as an affirmative defense – i.e., to exculpate a defendant notwithstanding proof of the involved crime's elements beyond a reasonable doubt. *See Kills On Top*, 901 P.2d at 1380 (an instruction embodying § 45-2-203 "merely advised the jury that intoxication does not excuse otherwise criminal conduct"). The third part reflects the substantive amendment made in 1987 and eliminates intoxication as a basis for negativing the existence of mens rea. However, the provision does not preclude consideration of intoxication for other purposes to the extent material to a determination of criminal liability, such as showing that a defendant was incapable of performing the conduct with which he was charged. The fourth part, finally, is a proviso dealing with involuntary intoxication, an issue not involved here.

In sum, § 45-2-203 eliminates voluntary intoxication as an affirmative defense for criminal conduct under any

circumstances and removes voluntary intoxication as a basis for negativing the State's proof of the mental state element in a crime. It is thus a substantive rule of law governing the determination of criminal responsibility and in this case barred Egelhoff from escaping criminal liability, to the extent his mental state at the time of the deliberate homicides was at issue, merely because he was voluntarily intoxicated.

2. Voluntary intoxication, as it pertains to criminal responsibility, implicates profound matters of public policy concern. The Montana legislature's restriction on voluntary intoxication evidence simply prevented voluntarily intoxicated defendants like Egelhoff from relying upon the fact of their intoxication to negate mental state and effectively imposed the same standard of criminal culpability on them as on a comparably-situated sober actor by removing intoxication as a factor to be considered by the fact finder. A determination, like that reached by the Montana court, invalidating this legislative assessment of culpability, ignores the critical fact that the defendant voluntarily caused his own intoxication and should not be permitted to benefit from a condition he alone created.

The Montana court's conclusion also ignores the serious harm that a tolerant attitude regarding voluntary intoxication may generate. Alcohol abuse is involved in many serious crimes, particularly crimes of violence. Approximately one-half of all homicide perpetrators are under the influence of alcohol at the time of the incident. Note, *Alcohol Abuse and the Law*, 94 Harv. L. Rev. 1660, 1681-82 (1981); *see also Intoxication As a Criminal Defense*, 55 Colum. L. Rev. 1210 (1955). Just as New York was

unwilling, for valid policy reasons, to require the prosecution to establish the absence of extreme emotional disturbance beyond a reasonable doubt (*Patterson*, 432 U.S. at 207), Montana is unwilling to allow those who commit serious crimes to benefit from a voluntarily assumed condition. Contained in § 45-2-203 is a public policy assessment that the inherent risk of impaired judgment associated with intoxication is readily apparent to those who choose to become intoxicated. In addition, the societal consequences from intoxication are so detrimental that, as to the existence of a required mental state, the intoxicated person should be denied any exculpatory excuse based on the mere fact of voluntary intoxication.

A State accordingly has very significant policy grounds for determining that the act of voluntary intoxication carries with it sufficiently blameworthy consequences to warrant its exclusion from consideration as to mental state. Allowing a defendant to exculpate his conduct by means of a self-induced condition flies in the face of the principle of personal accountability forming the foundation of all law. Moreover, because that condition ordinarily, if not always, is within the control of the defendant and because of its high correlation to criminal activity, voluntary intoxication requires, and has received, unique judicial and legislative treatment.[1] Section 45-2-203 falls squarely within this long tradition by

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[1] Egelhoff has never contended his alcohol consumption was involuntary or, for that matter, the result of some addiction beyond his control. Whether the latter circumstance would ever make a constitutional difference thus need not be considered. *Cf. Powell v. Texas*, 392 U.S. 514 (1967).

depriving a voluntarily intoxicated person of the ability to negative the intent element of a crime on the basis of his intoxication – i.e., by depriving him of the ability to use one form of culpable conduct to eliminate responsibility for another.

B. The Montana Statute Is Fully Consistent With Common Law Rules Extant at the Time the Constitution Was Adopted.

In defining the Due Process Clause's substantive limits on criminal law, the Court often has looked to the common law and the practice of various jurisdictions, *see, e.g., Schad v. Arizona*, 501 U.S. 624, 640-43 (1991). At common law, voluntary intoxication was not a defense in a criminal prosecution. *Hopt v. People*, 104 U.S. 631, 633 (1881) ("At common law, indeed, as a general rule, voluntary intoxication affords no excuse, justification, or extenuation of a crime committed under its influence"); Benton et al., *Special Project: Drugs*, 33 Vand. L. Rev. 1145, 1172 (1980); Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045, 1046-47 (1944). Indeed, historically, there is some support for the proposition that if an actor was drunk, the crime was to be punished more severely. Blackstone states, "[O]ur law looks upon this as an aggravation of the offense, rather than as an excuse for any criminal misbehavior." 4 W. Blackstone, *Commentaries on the Law of England*, at 25-26 (1769). *See also* Paulsen, *Intoxication as a Defense to Crime*, 1961 U. Ill. L.F. 1 & n.4.

At "old common law," the courts would not allow a defendant who became voluntarily intoxicated to urge his infirmity as a defense to a specific intent crime. His intent

was presumed as long as he acted as if he had the requisite intent. Murphy, *Has Pennsylvania Found a Satisfactory Intoxication Defense?*, 81 Dick. L. Rev. 199, 206 (1977). Early common law also made no concession whatever because of intoxication, however gross,[2] even though homicides committed by insane persons were treated with some lenience. The earliest report is dated 1551 and approves the death sentence for a homicide committed by a defendant in extreme intoxication. *Reniger v. Fogossa*, 1 Plowden 1, 75 Eng. Rep. 1 (K.B. 1551). From that time to approximately the mid-nineteenth century, this rigorous rule prevailed. The reasons advanced in support of the rule that voluntary intoxication is no defense include the ease of counterfeiting the disability,[3] the belief that there could rarely be a conviction for homicide if drunkenness avoided responsibility,[4] and the fact that homicide and many other crimes frequently involve intoxication and, apparently by sheer force of numbers, it would not be wise to relax the rule. The commonly accepted view was that "such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses." 1 Hale, *Pleas of the Crown* at 32. Justice Story, while riding the Circuit, stressed the merit of "the

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[2] *See* Singh, *History of the Defence of Drunkenness in English Criminal Law*, 49 Law Q. Rev. 528, 530 (1933).

[3] 1 Hale, *History of the Pleas of the Crown*, at 32 (1736) ("Now touching the trial of this incapacity . . . this is a matter of great difficulty, partly from the easiness of counterfeiting the disability . . . and partly from the variety of the degrees of this infirmity").

[4] 1 Wharton, *Criminal Law* § 66, at 95 (1932).

law allowing not a man to avail himself of the excuse of his own gross vice and misconduct to shield himself from the legal consequences of such crime." *United States v. Drew*, 25 F. Cas. 913 (C.C.D. Mass. 1828) (No. 14,993); *see also Pearson's Case*, 2 Lew. C.C. 144, 168 Eng. Rep. 1108 (N.P. 1835) (voluntary drunkenness is no excuse). *See* Benton, 33 Vand. L. Rev. at 1172; Hall, 57 Harv. L. Rev. at 1046-47.

In the late nineteenth century, as part of an effort to mitigate the stringent but reasonable common law rule, the courts crafted a new rule allowing evidence of voluntary intoxication to negate the required mental state in "specific intent" crimes, but making the evidence inadmissible for "general intent" crimes.[5] *See, e.g., Regina v. Doherty*, 16 Cox Cr. C. 306, 308 (N.P. 1887) ("[A]lthough you cannot take the drunkenness as any excuse for crime, yet when such crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime"); *see also Commonwealth v. Rumsey*, 454 A.2d 1121, 1123 (Pa. Super. Ct. 1983); Benton, 33 Vand. L. Rev. at 1172; Hall, 57 Harv. L. Rev. at 1046-49.

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[5] Since Montana revamped its criminal statutes in 1973, borrowing concepts of mens rea from the Model Penal Code, specific intent need not be shown unless the statute defining the offense requires a specific purpose as an element thereof. *State v. Starr*, 664 P.2d 893, 897 (Mont. 1983). Deliberate homicide, the offense with which Egelhoff was charged and convicted, is not one of these "dual intent" crimes. Obviously, complete exculpation in this situation is at odds with the common law doctrine that voluntary intoxication is no excuse.

As the courts struggled with determining whether a particular crime was one involving "specific" or "general" intent, it became apparent that the dividing line was based not so much on an inquiry of what subjective state of mind was required for each offense, but rather on matters of policy concerning what criminal responsibility should be borne by intoxicated offenders. *People v. Rocha*, 479 P.2d 372, 375-76 (Cal. 1971); *People v. Hood*, 462 P.2d 370, 377-79 (Cal. 1969). Generally, those crimes defined as requiring specific intent were those in which negation due to intoxication would not result in total acquittal, but would only lead to the offender's responsibility being lowered to a lesser crime. The specific intent-general intent dichotomy was severely criticized as creating artificial distinctions between criminal intents, as being elusive in definitions, and as leading to inconsistent results. *See, e.g.*, Hall, 57 Harv. L. Rev. at 1064; *Alcohol Abuse*, 94 Harv. L. Rev. at 1684.

This Court has recognized that common law traditions have substantial relevance in determining the scope of the Due Process Clause in the Fifth and Fourteenth Amendments "because the criminal process is grounded in centuries of common-law practice." *Medina v. California*, 112 S. Ct. 2572, 2577 (1992); *accord Schad*, 501 U.S. at 640-41; *Patterson*, 432 U.S. at 202; *see also Godinez v. Moran*, 113 S. Ct. 2680, 2689-91 (1993) (Kennedy, J., concurring). State criminal procedural or substantive practices consistent with those traditions thus offer little assistance to a claim, such as the one here, that such practices "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental."

Patterson, 432 U.S. at 202 (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)); *see also Schad*, 501 U.S. at 633.

The decision of the Montana legislature, and the state legislatures of at least nine other States, to preclude a defendant from relying on his voluntary intoxication to negate the existence of the required mental state clearly falls within the common law tradition. Because no doubt exists that a legislature acting at the time of the Constitution's adoption would have been free to adopt the precise restriction challenged here, Egelhoff has an unusually heavy burden to show that the operation of § 45-2-203 in his prosecution violated the Due Process Clause.

C. The Court Has Recognized Repeatedly the Constitutionally Unrestricted Prerogative of States to Determine the Nature and Scope of Criminally Culpable Conduct.

The Court has been extremely reluctant to construe the Constitution to intrude upon the administration of justice by the individual States because preventing and dealing with crime is much more the States' responsibility than the federal judiciary's. A State's policy judgments in this sensitive area will not be second-guessed under the due process standards unless those judgments offend "the very essence of a scheme of ordered liberty" (*Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). *See Schad*, 501 U.S. at 633.

The vast majority of States limit the use of voluntary intoxication evidence. *See* 1 Paul H. Robinson, *Criminal Law Defenses* § 65(a), 289-93 (1984); *id.* at 43-45 (1995 Supp.). If a State constitutionally can limit the application

of voluntary intoxication as an affirmative defense, it is logical to conclude that a State can take the next step and preclude a defendant from relying on voluntary intoxication to negate the existence of the required mental state so long as it retains its ultimate burden to establish the required mens rea beyond a reasonable doubt. Montana and at least nine other states have adopted the latter course.

The fundamental issue here is whether this intuitively appropriate result is somehow inconsistent with basic notions of due process. An analysis of the treatment of intoxication at common law – often the starting point for identifying core due process rights – has established that voluntarily intoxicated persons were not permitted to take advantage of that condition to escape criminal liability. Complementing this common law tradition is the Court's settled recognition that States have broad authority to define crimes as they see fit, and with that authority comes the power to determine what shall, or shall not, exculpate a person from those crimes.

1. The Court has found the States constitutionally prohibited from creating presumptions of guilt (*McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86 (1916)) and from shifting the burden of proof on the elements of any crime (*Sandstrom v. Montana*, 442 U.S. 510 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. at 358). The Court nevertheless has been quite hesitant to impose constitutionally derived restrictions on the types of criminal laws state legislatures may pass. It thus has allowed the States, which have always been primarily responsible for the prevention and prosecution of crime, great latitude in defining the elements of and defenses to

crimes. A review of those decisions finding a due process limitation on the States' authority reflects the narrow reach of the Fourteenth Amendment in this field.

In *McFarland*, 241 U.S. at 86, the Court stated that the legislature's power to raise presumptions and change the burden of proof is expansive but not limitless. There must be a rational connection between the fact proved and the ultimate fact presumed. The Court declared that the legislature exceeded its power in that case when it enacted a statute which declared an individual presumptively guilty of a crime. *See also Tot v. United States*, 319 U.S. 463, 469 (1943) (the legislature has no power to command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all facts essential to guilt).

In *Mullaney*, 421 U.S. at 684, the charge was murder, which the Maine statute defined as the unlawful killing of a human being "with malice aforethought either express or implied." The trial court instructed the jury that the words "malice aforethought" were vital because "malice aforethought is an essential and indispensable element of the crime of murder." Under the statute, malice was to be implied from "any deliberate, cruel act committed by one person against another suddenly . . . or without a considerable provocation." An intentional killing consequently was murder unless the defendant could show by a preponderance of evidence that the act was committed "in the heat of passion, on sudden provocation." *Id.* at 686-87. The Court stated that this shifting of the burden onto the defendant to negate the element of "malice aforethought," a fact which the State deemed so fundamental that it must either be proved or presumed,

was beyond the State's powers under the Due Process Clause.

In *Sandstrom v. Montana*, 442 U.S. 510 (1979), the defendant was charged under a Montana statute with deliberate homicide in that he "knowingly" or "purposely" caused the victim's death. The trial court instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" over the defendant's objection that the instruction had the effect of shifting the burden of proof on the issue of knowledge or purpose. The Court held that the instruction violated the Due Process Clause because it impermissibly shifted to the defendant the burden of disproving an element of the crime charged, i.e., purposely or knowingly. *Id.* at 512.

In *In re Winship*, 397 U.S. 358, 360 (1970), the Court was presented with the "single, narrow question whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult." The Court there "constitutionalized" the reasonable doubt standard, stating that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364.

These cases, which set forth certain procedural limitations on the State's authority under the Due Process Clause, are not applicable to the instant case. This case involves a substantive legislative determination of standards for imposing criminal responsibility.

2. Far more relevant here is the line of cases including *Patterson*, 432 U.S. at 197, and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), where the Court has demonstrated its reluctance to restrict under due process principles the authority of States to formulate substantive criminal law. Determinations about what facts are necessary to constitute the crime instead "represent value choices more appropriately made in the first instance by a legislature rather than by a court" acting under the most general of guidance provided by the Due Process Clause in the Fourteenth Amendment. *Schad*, 501 U.S. at 637. Implicit in the States' right to define the elements of a particular crime is the right to determine what defenses to that crime they will recognize and, by parity of reasoning, whether certain forms of voluntary conduct shall be deemed exculpatory with respect to negativing elements of a crime.

In *Patterson*, this Court held that due process requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense with which the defendant is charged. The Court stressed that, in determining what facts must be proved beyond a reasonable doubt, the State legislature's definition of the elements of the offense usually is dispositive. The Court stated that the application of the reasonable doubt standard has always been dependent on how a State defines the offense (432 U.S. at 214 n.12) and that *Mullaney*, 421 U.S. at 684, did not require the prosecution to prove beyond a reasonable doubt every factor or consideration affecting the degree of criminal culpability which is not

specifically included as an element of the offense. *Patterson*, 432 U.S. at 214.[6]

In *McMillan*, the Court upheld a state statute that imposed a mandatory minimum sentence of five years for visible possession of a firearm during the commission of certain enumerated felonies. The State was not required to charge and prove the fact of possession at trial. Rather, the statute specified that the issue would be reserved for sentencing, to be resolved by the judge by a preponderance of evidence. 477 U.S. at 91. The defendants challenged the constitutionality of the Pennsylvania law under the due process rules of *In re Winship*, 397 U.S. 358 (1970), arguing that possession of a weapon was a fact that had to be treated as an element of the offenses with

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[6] In *Patterson*, the defendant was convicted of second degree murder after the State proved beyond a reasonable doubt that the defendant had caused the death of another person and that he had intended that death. The conviction would have been reduced to manslaughter if Patterson had persuaded the jury that he had "acted under the influence of extreme emotional disturbance," a burden he bore under New York law. Patterson challenged, on due process grounds, the allocation of the burden of proof on this mitigating factor. The Court approved placing the burden of proof on the defendant and affirmed the conviction, stating that under state law, "[t]he death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime." 432 U.S. at 205-06. Thus, the Court found that the State may define the offense of murder without reference to the defendant's "heat of passion" at the time of the offense and, because the State proved beyond a reasonable doubt the elements in the definition of the offense, due process was satisfied.

which they had been charged. If this were so, the State would be required to prove the relevant facts at trial beyond a reasonable doubt, and the issue could not be delayed until sentencing, where it could be resolved under a lower standard of proof and in the absence of other trial-type protections. In rejecting the claim, the Court stressed its traditional deference to state legislative judgments in matters of criminal justice and restated that, in determining what facts must be proved beyond a reasonable doubt, the State legislature's definition of the elements of the offense is usually dispositive. 477 U.S. at 85.

The Court has accorded broad discretion to the States to define its substantive criminal law because it recognizes that preventing and dealing with crime is a preeminent role of the States. *Patterson*, 432 U.S. at 201; *McMillan*, 477 U.S. at 85; *see also Schad*, 501 U.S. at 638; *Martin v. Ohio*, 477 U.S. at 232. As Justice Black observed in his concurrence in *Powell*, 392 U.S. at 545:

> The legislatures have always been allowed wide freedom to determine the extent to which moral culpability should be a prerequisite to conviction of a crime. *E.g., United States v. Dotterweich*, 320 U.S. 277 (1943). The criminal law is a social tool that is employed in seeking a wide variety of goals.

The Court thus has recognized that, traditionally, due process requires that only the most basic procedural safeguards be observed. More subtle balancing of society's interests against those of the accused has been left to the States' legislative branches. *Patterson*, 432 U.S. at 210.

The Court also has recognized repeatedly that one of the States' greatest rights under federalism is the dynamic ability to define criminal standards in accord with the beliefs of its citizens. Perhaps in no other area of law does society express its accepted norms or standards more directly than in determining what constitutes criminal behavior. The changing views of criminal responsibility will be reflected by a state legislature as it decides whether to recognize certain defenses, the limitations to place on defenses and, as in this case, the criminal responsibility of the voluntarily intoxicated actor.

3. Contrary to the Montana court's decision, neither *Martin v. Ohio*, 480 U.S. 228 (1987), nor *Chambers v. Mississippi*, 410 U.S. 284 (1973), compels the conclusion that the intoxication instruction in this case impermissibly reduced the State's burden of proof with respect to the mens rea element of the crimes with which Egelhoff was charged. In *Martin*, Ohio defined aggravated murder as "purposely causing the death of another with prior calculation or design" and required the defendant to prove self-defense by a preponderance of the evidence. Martin argued that this scheme violated due process because a purposeful killing could still be lawful if done in self-defense, yet the defendant bore the burden of proof as to that defense. The Court upheld placing upon Martin the burden of proof for self-defense because the prosecution still was obligated to prove all the express elements of murder, as defined by the state law, beyond a reasonable doubt. 480 U.S. at 232. Under *Martin*, therefore, the State is free to define the offense of murder without including the absence of self-defense as an element.

The *Martin* dissent expressed concern that, since evidence of self-defense may bear on a finding of prior calculation and design, instructing the jury that the defendant bears the burden of proof on self-defense created an inconsistency with the instruction that the State must prove mens rea beyond a reasonable doubt. 480 U.S. at 237-42 (Powell, J., dissenting). The majority, however, believed that the instructions adequately directed the jury to consider self-defense evidence in deciding if the State met its burden of proving prior calculation and design, whether or not the evidence was sufficient to establish the affirmative defense of self-defense. *Id.* at 233-34. Relying on the majority's observation in *Martin*, the Montana Supreme Court incorrectly held that the State was unconstitutionally relieved of part of its burden to prove mental state when the jury was instructed that it could not consider Egelhoff's voluntary intoxication in determining whether he acted knowingly or purposely. (Pet. App. 12a-14a.) *Martin* is readily distinguishable from this matter.

First, the Court noted that under Ohio law, evidence that a killing was done in self-defense could "justify the killing" and "show [the defendant] to be blameless" without reference to whether such evidence established an affirmative defense. 480 U.S. at 233. In other words, denying the defendant the opportunity to present evidence that he acted in self-defense would create the serious risk of convicting a blameless person under the standards of culpability expressly adopted by the Ohio legislature. Here, in contrast, the Montana legislature has not determined that the fact a defendant is intoxicated when he commits an offense renders the intoxicated offender

blameless; indeed, in large measure the legislature has reached exactly the opposite conclusion. Unlike the situation with self-defense, a defendant in Montana who is prevented from presenting evidence of his voluntary intoxication on the issue of his mental state cannot complain that the State created the peril of convicting an actually "innocent" person since, by operation of state substantive criminal liability principles, voluntary intoxication cannot serve to establish nonculpable intent.

Second, Ohio recognized the defense of self-defense. One can argue that when a State provides a defense capable of totally or partially exonerating a defendant, it evinces recognition that the exculpatory factor significantly and legitimately affects criminal responsibility. In contrast, the Montana legislature has chosen to exclude voluntary intoxication as an exculpatory factor by expressly providing that the fact that a defendant is voluntarily intoxicated does not affect his criminal responsibility. Since States are not constitutionally required to allow such defenses (*see United States ex rel. Goddard v. Vaughn*, 614 F.2d 929, 935 (3d Cir.), *cert. denied*, 449 U.S. 844 (1980)), it thus follows logically that States are not constitutionally required to permit defendants to introduce evidence of such conditions to defeat a substantive element of a crime. *See Fisher v. United States*, 328 U.S. 463, 473 (1946) (in a trial for murder in the first degree, which made deliberation and premeditation essential elements of the crime, the court did not err by refusing to instruct the jury that they should consider evidence of the defendant's mental deficiency, not amounting to legal insanity, to determine whether he was guilty).

This case is also unlike *Chambers*, where Mississippi's evidentiary rules precluded the defendant from presenting an actual innocence defense otherwise recognized under state law as exculpatory. Montana's challenged instruction did not preclude consideration of voluntary intoxication for the purpose of negating the conclusion that Egelhoff inflicted the fatal blows, and it did not prevent Egelhoff from using voluntary intoxication to support his "fourth-person" defense. Stated otherwise, the instruction did not preclude Egelhoff from using the fact of intoxication to establish his actual innocence – i.e., that he did not or could not perform the physical act with which he was charged because of his intoxicated condition. It did preclude him, however, from using voluntary intoxication to negate the prosecution's showing that the homicides were carried out by him knowingly or purposely because the legislature has determined that no exculpatory value should be assigned to that condition to the extent it may affect a person's mental state.[7]

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[7] The fact the voluntary intoxication is not exculpatory with respect to an offense's mental state requirement also distinguishes this matter from cases where "an evidentiary ruling deprived [a defendant] of his fundamental right to a fair opportunity to present a defense." *Crane v. Kentucky*, 476 U.S. 683, 687 (1986). Those decisions have involved state procedural practices or statutes which interposed an arbitrary barrier to a defendant's ability to present otherwise admittedly exculpatory evidence. *Crane*, 476 U.S. at 689 (state procedure which prohibited evidence at trial concerning voluntariness of confession when that issue had been resolved in suppression hearing impaired due process rights since, "regardless of whether the defendant marshalled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall

4. This Court, in short, has never imposed its views on the States as to the mens rea required for a particular offense. It intentionally has refrained from doing so because the doctrine of mens rea has "historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States." *Powell*, 392 U.S. at 536. On the basis of general deterrence objectives, a State therefore may, when the offender stands in a position of responsibility for the resulting events and the ensuing harm is great, impose criminal responsibility without demonstrating ***any*** culpable mental state of the actor toward the harm. *United States v. Park*, 421 U.S. 658, 670-73 (1975); *United States v. Dotterweich*, 320 U.S. 277, 281, 285 (1943); *see also United States v. Freed*, 401 U.S. 601, 607 (1971); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 70 (1910). For valid and

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on his ability to convince a jury that the manner in which the confession was obtained casts doubt on its credibility"); *Webb v. Texas*, 409 U.S. 95, 98 (1972) (per curiam) (judge's threatening remarks to defendant's only witness, which "effectively drove the witness off the stand," violated due process); *see also Washington v. Texas*, 388 U.S. 14 (1967) (state procedural statute barring testimony of persons charged as principals, accomplices or accessories in the same crime from testifying on one another's behalf violated the compulsory process provision of the Sixth Amendment as incorporated into the Fourteenth Amendment). They therefore did not involve the question whether, as a matter of state substantive law, certain evidence was deemed to have no exculpatory value for a particular purpose. *See Gilmore v. Taylor*, 113 S. Ct. 2112, 2118 (1993).

important reasons, Montana has excluded from consideration as an exculpatory factor a defendant's voluntary intoxication on the issue of his mental state, but not for any other purpose.[8] This process of adjusting the mental state culpability of the voluntarily intoxicated offender wholly comports with the expansive authority possessed by States to determine what constitutes criminal conduct.

The Due Process Clause accordingly does not prohibit the policy choice made in § 45-2-203. The statute instead establishes as substantive law the principle that the mens rea for all crimes, including deliberate homicide, must be determined without reference to a defendant's voluntary intoxication. Such a substantive rule is rationally related to the State's interest in preventing

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[8] In the instant case, for example, the State convinced the jury, which was instructed to convict only if it found beyond a reasonable doubt that Egelhoff took the lives of the victims knowingly or purposely, that he had done so through the events attendant to the criminal episode. *See* Mont. Code Ann. § 45-2-103(3) (1995) ("The existence of a mental state may be inferred from the acts of the accused and the facts and circumstances connected with offense"); *State v. Hardy*, 604 P.2d 792, 796 (Mont. 1980). This evidence included the facts that first, Egelhoff had to obtain his weapon from the glove compartment, indicating that the shooting was the product of some deliberation. Second, only two rounds were fired from Egelhoff's gun and the victims' deaths resulted from single-shot head wounds. This identical and efficient mode of the homicides' execution is not consistent with a mindless act of violence. Third, Egelhoff made a number of attempts to escape detection when approached by passersby demonstrating a plain awareness of the unlawfulness of his actions. Accordingly, there was more than substantial evidence from which the jury could find that Egelhoff committed these murders with knowledge or purpose.

crime, is firmly rooted in the history and traditions of the common law, and does not exceed any of the due process bounds enunciated by this Court. Montana's intoxication statute does not remove any argument of actual innocence from the arsenal of voluntarily intoxicated defendants or deprive them of the ability to negate even the mental state element on a basis other than their intoxication; it mandates only that such defendants may not exculpate themselves on the grounds that their intoxication prevented them from acting knowingly or purposely. In so providing, § 45-2-203 imposes the same standard of criminal liability on both the sober and the voluntarily intoxicated defendant.

CONCLUSION

The judgment of the Montana Supreme Court should be reversed.

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No. 95-566

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

JAMES ALLEN EGELHOFF,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Montana

JOINT APPENDIX

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Petition For Certiorari Filed October 4, 1995
Certiorari Granted December 8, 1995

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NOTICE OF LOCATION OF LOWER COURT OPINIONS AND ORDERS NOT REPRINTED IN THE JOINT APPENDIX

The following opinion and jury instructions have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

RELEVANT DOCKET ENTRIES FOR MONTANA V. EGELHOFF:

Date	Doc. No.	Proceeding
7/31/92	02	Motion for Leave to File Information Direct and Supporting Affidavit
7/31/92	03	Order Granting Leave to File Information Direct
7/31/92	04	Information
4/7/93	163	Jury Instruction No. 1
5/7/93	169	Motion For New Trial
5/25/93	170	State's Brief in Opposition of Motion For New Trial
6/18/93	174	Denial of Motion For New Trial
6/18/93	175	Judgment (Defendant sentenced to 40 years in the Montana State Prison on each count of deliberate homicide. In addition, Defendant sentenced to two years in the Prison on each count for using a firearm in the commission of each offense.)
Trial Transcript, pp. 1158-59		Defendant's objection at trial to Jury Instruction No. 11.

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(406)293-2717

Attorney for Plaintiff

MONTANA NINETEENTH JUDICIAL
DISTRICT COURT, LINCOLN COUNTY

THE STATE OF MONTANA, Plaintiff, vs. JAMES ALLEN EGELHOFF, Defendant.	)	No. DC 92-60 MOTION FOR LEAVE TO FILE INFORMATION DIRECT (Filed July 31, 1992)

COMES NOW, SCOTT B. SPENCER, County Attorney in and for Lincoln County, Montana, and hereby asks leave of the Court to file an Information charging the offense of **DELIBERATE HOMICIDE, two counts,** against James Allen Egelhoff.

This request is based upon the Affidavit annexed hereto.

DATED this 30th day of July, 1992.

/s/ Scott Spencer
Scott B. Spencer
County Attorney

STATE OF MONTANA)
) ss: AFFIDAVIT
County of Lincoln)

SCOTT B. SPENCER, being first duly sworn, deposes and says:

1. Your Affiant is the duly appointed, qualified and acting County Attorney for Lincoln County, Montana, and in such capacity, your Affiant has learned the information contained in this Affidavit;

2. At approximately just before midnight on July 12, 1992, Becky Garrison (hereinafter "Garrison") was driving on highway 2 west of Troy near Yaak Hill. Kerry Tunison Jr (hereinafter "Tunison") and Garrison's daughter were in the car. They came across a spot on the road on the top of Yaak Hill where it appeared a car hit the guardrail. They saw a blue Ford Galaxy leaving the area of the guardrail. The guardrail was damaged. Car parts were laying on the roadway. They followed the 1974 Ford Galaxy down the road. It was driving about 5 to 10 mph. The Ford Galaxy was weaving down the road. Becky Garrison suspected that the driver of the vehicle was intoxicated due to the way that the car was driving and due to what they had seen as to the guardrail. Garrison and Tunison looked at the license plate number on the Ford Galaxy and got a description of the Ford Galaxy. Tunison told Sheriff's deputies that the Ford Galaxy stopped in the driving lane of the highway across from the Cornwall residence. Garrison pulled around the Ford Galaxy and into the driveway of the Cornwall residence to call 9-1-1.

3. Garrison went into the residence to call 911. Tunison ran toward the Ford Galaxy to see if the people in the car needed assistance. As Tunison approached the Ford Galaxy, the car suddenly accelerated past him. He had to dodge out of the way of the car. It went by him and went into a ditch. He could not tell how many people were in the car or who was driving. Tunison heard sounds as if the car was trying to get out of the ditch.

4. Garrison and Tunison ran to the Ford Galaxy. Defendant James Allen Egelhoff (hereinafter "Egelhoff") was laying down in the back of the Ford Galaxy. A female identified as Roberta Jean Pavola (hereinafter "Pavola") was on the passenger side of the front seat in a fetal position. A male identified as John Darrell Christenson (hereinafter "Christenson") was laying on the front seat with his head on the driver's side of the vehicle. His feet were crossed and on the passenger side of the vehicle. Pavola was laying on top of his legs. Tunison said no one got out of the Ford Galaxy. Tunison went up to the Ford Galaxy. Egelhoff was yelling "Oh, my hands, my hands."

5. Officer Gary McVay of the Lincoln County Sheriff's office was summoned, as well as an ambulance crew. Garrison, Tunison and other passerbys removed Pavola and Christenson from the vehicle. CPR was administered to Pavola and Christenson. When the ambulance arrived, Egelhoff was still in the Ford Galaxy. McVay observed a pistol holster on Egelhoff's belt. The ambulance crew first administered to Christenson and Pavola. Christenson and Pavola were transported to St. John's Lutheran Hospital in Libby. Egelhoff was also transported to the hospital. At the hospital, it was determined that Christenson and Pavola had been shot in the head. The bullet wounds

suggested a weapon of a caliber somewhere between a .38 and a .22. Egelhoff no longer had the holster on his belt. The holster was not at the hospital and not in the ambulance. McVay also saw a woman's purse laying in the car.

6. Christenson was shot in the back of the head on the right side. Pavola was shot in the left temple. Cause of death for each person was the gunshot wound.

7. Detective Doug Johnson was summoned to the scene, which is between milepost 4 and mile post 5 between the top of the Yaak Hill and the junction of the Yaak Highway. He saw blood in the Ford Galaxy. He also saw what appeared to be a .38 cal 2" barrel pistol on the floor of the Ford Galaxy. The pistol and blood were in plain view from outside of the Ford Galaxy.

8. The Ford Galaxy is registered to Christenson. Christenson has two sets of license plated [sic] registered to him, one for a car and one for a truck. The truck plates are on the car.

9. Detectives for Lincoln County Sheriff's Office later found blue paint on the guardrail. The Ford Galaxy was impounded and stored. The left fender and front grill of the Ford Galaxy is severely crumbled.

10. The 1974 Ford Galaxy station wagon was searched pursuant to search warrant. A .38 caliber Colt revolver was found on the floor board to the station wagon. Two bullets had been fired from the pistol. The window on the passenger side of the vehicle had been destroyed. Window fragments were found on the floor board of the front seat of the station wagon. Blood stains

were found on the car seat and on the passenger door to the station wagon.

11. Egelhoff was interviewed at the hospital. Egelhoff stated that an unidentified fourth person killed Pavola and Christenson. Egelhoff stated that he fled from the car after it came to rest on the top of the Yaak Hill prior to any shots being fired. He stated he fled up a hill side. He stated that he heard two shots fired. Garrison observed the car from the entire time it came to rest until ambulance personnel removed Egelhoff from the blue Ford Galaxy to transport him to St. John's Lutheran Hospital. Egelhoff did not leave the car at any time nor was any fourth person present. Members of the Sheriff's Office investigated the hill side near to where the car came to rest. There is no sign whatsoever that any party was on the hill side.

12. Members of the Lincoln County Sheriff's Department investigated Highway 2 from the top of Yaak Hill back toward Troy several miles to the KOA Campground near the Kootenai River. Officers investigated what is known as old Highway 2 to the KOA Campground, where old Highway 2 joins the existing Highway 2, to the bridge over the Kootenai River by Troy. They discovered on the right side of the highway as a person drives toward Idaho numerous locations where a vehicle swerved off the road into the barrow [sic] pit. The barrow pit is often referred to as the ditch. They found a location where a vehicle swerved off the barrow pit, appeared to back up in the dirt, and go back on to the highway. There is clover in that area. Officers discovered on the rear bumper of the blue Ford Galaxy clover and dirt.

13. Dr. Griffith was driving on Highway 2 West of Troy shortly after 11:00 P.M. on July 12, 1992 when he saw an older model blue car in the area of the KOA campgrounds. He saw the car swerve several times and then go into the barrow pit. Griffith stopped to render assistance. Three people were in the car. One, and possibly two, people yelled at Griffith to stay away. Griffith and others who stopped to render assistance became frightened and left. Leslie Love was one who stopped at the scene. Love could see only one person in the car. The person in the car was revving up the engine trying to get out of the ditch. Eventually, the vehicle got out of the ditch. Love followed the car about 1/4 mile. The car swerved from side to side and eventually went into the ditch again. Love passed the car. Love stopped at Stateline and called the Sheriff to report the driving of the car. Officers also discovered a location on old Highway 2 near to a cedar mill where a vehicle swerved off the road. There is colored glass, which apparently is of the type from the window of the blue Ford Galaxy, scattered along that location where the car went off of the road. People who were working at the mill stated that a car drove by slowly about midnight on or between July 12 and July 13.

14. Officers also found on old Highway 2, approximately .9 mile from Troy and on a place where the road is ascending a hill, a pile of glass in the middle of the road. This glass is granulated and appears of the same type as in the window of the blue Ford Galaxy. Also found mixed in with the glass were what appeared to be three bone fragments. The gun shot wound to Pavola exited her skull. Bone fragments would be scattered as a result of the exit wound.

15. Pavola, Christenson, and Defendant were seen drinking together in Troy on July 12, 1992. They were drinking at the Yaak Apartments in Troy. The three left together in the Ford station wagon about dark or shortly thereafter. Darkness falls about 10:30 P.M.

16. Several acquaintances of Defendant stated he carries a .38 caliber snub-nose revolver in a holster on his hip. A Daryl Langton stated that Defendant had the pistol in the early evening of July 12, 1992.

Further your Affiant sayeth naught.

/s/ Scott Spencer
Scott B. Spencer

SUBSCRIBED AND SWORN to before me this 31 day of July, 1992.

(SEAL)

/s/ Debra S. Kambel
Notary Public for the State
Montana, residing at Libby
My Commission expires 8-27-94

JUDGE ROBERT S. KELLER

MONTANA NINETEENTH JUDICIAL DISTRICT
COURT, LINCOLN COUNTY

THE STATE OF MONTANA, Plaintiff, vs. JAMES ALLEN EGELHOFF, Defendant.	)	No. DC-92-60 ORDER GRANTING LEAVE TO FILE INFORMATION DIRECT (Filed July 31, 1992)

Motion for Leave to File Information Direct having been made, and good cause appearing in the Affidavit as annexed thereto,

IT IS HEREBY ORDERED:

That SCOTT B. SPENCER, County Attorney in and for Lincoln County, Montana, is granted permission to file an Information against the above named Defendant.

DATED this 31st day of July, 1992.

/s/ Robert S. Keller
ROBERT S. KELLER
District Judge

Copy: County Attorney
7/31/92 bn

SCOTT B. SPENCER
County Attorney
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(406) 293-2717

Attorney for Plaintiff

MONTANA NINETEENTH JUDICIAL DISTRICT
COURT, LINCOLN COUNTY

THE STATE OF MONTANA,	)	No. DC-92-60
	)	INFORMATION
Plaintiff,	)	(Filed July 31, 1992)
vs.	)	
JAMES ALLEN EGELHOFF,	)	
Defendant.	)	

SCOTT B. SPENCER, County Attorney for Lincoln County, Montana, charges that late on July 12, 1992, or the early morning hours of July 13, 1992, at Lincoln County, Montana, the above named Defendant committed the following offenses:

COUNT I

DELIBERATE HOMICIDE, a felony, in violation of §45-5-102, M.C.A.

The facts constituting the offense are that Defendant purposely or knowingly caused the death of another human being. Defendant killed John Darrell Christenson by shooting him in the head. The offense occurred in Lincoln County, Montana.

COUNT II

DELIBERATE HOMICIDE, a felony, in violation of §45-5-102, M.C.A.

The facts constituting the offense are that Defendant purposely or knowingly caused the death of another human being. Defendant killed Roberta Jean Pavola by shooting her in the head. The offense occurred in Lincoln County, Montana.

Conviction of each count of **DELIBERATE HOMICIDE,** a felony, is punishable by imprisonment in the Montana State Prison for 10 to 100 years or life, or death.

A list of possible witnesses for the State now known to the prosecution are as follows:

Don Litch, 14460 Bull Lake Road, Troy, MT
Steve Cook, Troy, MT
Leslie Dale Love, Jr., Box 311, Bonners Ferry, ID
Rick Flesher, 1462 E. 5th Street, Libby, MT
James Cosgriff, 775 Sheldon Flats, Libby, MT
Stan Stroisch, 115 Eid Lane, Kalispell, MT
Gary Lee Tores, PO Box 285, Troy, MT
Karen Helmrick, 180 Bighorn Way, Troy, MT
James William Darrington, PO Box 1086, Troy, MT
Dr. Griffith, 845 Hwy 2 West, Libby, MT
Robert Deans, Butte, MT
Dawn Thrasher,
Charlie Muchmore, Troy Police Department, Troy, MT
Bob Garrison,
Sue Close, 316 Yaak Avenue, Apt #2, Troy, MT
Kathy Seter, 316 Yaak Avenue, Troy, MT
Donn Ross, #10 Fairview Heights, Troy, MT
Carolyn Ross, #10 Fairview Heights, Troy, MT
Daryl Langton, 3436 Bitteroot, Billings, MT
Wade Olson, PO Box 10, Troy, MT

Kerry Tunison, PO Box 146, Troy, MT
Klint Gassett, Lincoln County Sheriff's Office, Libby, MT
Craig Martin, Lincoln County Sheriff's Office, Libby, MT
Gary McVay, Lincoln County Sheriff's Office, Libby, MT
Don Bernall, Lincoln County Sheriff's Office, Libby, MT
Doug Johnson, Lincoln County Sheriff's Office, Libby, MT
Jim Sweet, Lincoln County Sheriff's Office, Libby, MT
Steve Hurtig, Lincoln County Sheriff's Office, Libby, MT
Dr. Maloney, Prompt Care, Libby, MT
Dulci Wallace, O'Brien Creek, Troy, MT
Junior Peterson, Troy, MT
Charles Welch, Troy, MT
Dino Shelmerdine, Troy, MT
Mary Heim, Troy, MT
Randy Wiza, St. John's Hospital, Libby, MT
Unidentified Lab Technician, Crime Lab, Missoula, MT
Unidentified Lab Technician, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C.
Unidentified Lab Technician, Federal Bureau of Investigation, Washington, D.C.

DATED this 31 day of July, 1992.

/s/ Scott Spencer
Scott B. Spencer
County Attorney

Copies: Defendant
Sheriff
Adult P&P
MT State Prison (Cert.)
State Board of Pardons (Cert.)
6-18-93 np

INSTRUCTION NO. 1

Ladies and Gentlemen of the Jury:

It is my duty to instruct the jury on the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you.

No remark I make and no instruction I give is intended to express my opinion as to the facts in this case or what verdict you should return.

You should take the law in this case from my instructions alone. You should not accept anyone else's version as to what the law is in this case. You should not decide this case contrary to these instructions, even though you might believe the law ought to be otherwise. Counsel, however, may comment and argue to the jury upon the law as given in these instructions. If, in these instructions, any rule, direction or idea is stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. You are not to single out any sentence or any individual point or instruction, and ignore the others. You are to consider all of the instructions as a whole, and are to regard each in the light of all the others. The order in which the instructions are given has no significance as to their relative importance.

The function of the jury is to decide the issues of fact resulting from the charges filed in this Court by the State and perform this duty uninfluenced by passion or prejudice. You must not be biased against a defendant because he has been arrested for this offense, or because charges have been filed against him, or because he has been brought before the Court to stand trial. None of these

facts is evidence of guilt, and you are not permitted to infer or to speculate from any or all of them that the defendant is more likely to be guilty than innocent.

You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the State and the defendant have a right to demand, and they do demand and expect, that you will act conscientiously and dispassionately in considering and weighing the evidence and applying the law of the case.

GIVEN: /s/ Robert S. Keller
District Judge

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Attorneys for the Defendant

MONTANA NINETEENTH JUDICIAL DISTRICT COURT, LINCOLN COUNTY

* * * *

THE STATE OF MONTANA, Plaintiff,	)	Cause No. DC 92-60
vs.	)	MOTION FOR NEW TRIAL
JAMES ALLEN EGELHOFF, Defendant.	)	(Filed May 7, 1993)

* * * *

COMES NOW, the Defendant, James Allen Egelhoff, through his attorneys, and moves the Court to grant him a new trial, pursuant to {[sic] 46-16-702, M.C.A.

The grounds for the request for new trial are as follows:

1. There was not substantial credible evidence upon which the jury could have found the defendant guilty of the two charges of deliberate homicide, committed in violation of {45-5-102, M.C.A.

As previously argued at the conclusion of the prosecution's case and at the conclusion of the trial, there simply was not substantial credible evidence that defendant shot and killed the two decedents. There was no

proof that the bullets were fired from the gun found in the car, no proof that defendant handled that gun, no proof that he was ever in the front seat of the car. In addition, there was proof that he was "passed out" and could not have driven the car. There was also proof by an eye witness that there was a person other than defendant driving the car at the base of "Yaak Hill," when it was observed by Dr. Griffith and Leslie Love. The only proof offered by the State was that defendant was in the car when it was found and that the only two occupants were dead. However, there was no proof that a fourth person might not have exited the car.

This failure of proof, coupled with the erroneous instruction on the legal effect of voluntary intoxication as stated below, must give rise to a new trial for lack of substantial credible evidence of defendant's guilt beyond a reasonable doubt.

2. It is [sic] was reversible error for the trial court to have allowed a witness, Becky Garrison, to give an opinion regarding the manner in which the offense was committed. Ms. Garrison was asked by the prosecutor if she had such an opinion. This question was objected to, for the reason that the witness was not qualified to give such an opinion. The defense also objected on the grounds of surprise, for the reason that the statement of Garrison had not been supplied to the defense, despite the requests that had been made for discovery and this Court's Order that the State provide all such statements to the defense. The State certainly knew what Garrison was going to say when she was asked the question, and ought to have provided this statement to defense prior to questioning

her in court, before the jury. The Court allowed the witness to answer, subject to cross-examination of the defense. The witness then testified that she had the opinion that the defendant had been driving the car with the stick which was found by Garrison at the scene. This opinion tends to explain why the defendant had little blood on his clothing and the jury was persuaded by that testimony in finding the defendant guilty.

3. The jury ought not to have been instructed that voluntary intoxication is not a defense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense.

The State offered as an instruction to the jury a statement of the statutory language from {45-2-203, M.C.A., [sic] This instruction was objected to by the defense for the reasons that it was misleading to the jury and for the reason that the statute was unconstitutional in that it had the effect of shifting the burden of proof to the defense.

Approximately one hour after his apprehension at the final accident scene, defendant's blood was taken at the hospital and tested. The blood alcohol level was .36%, or more than three times the legal limit for intoxication according to the Montana motor vehicle operation laws. Defendant proved this amount in order to explain his inability to remember the events of the evening (an alcohol induced "Blackout" as testified to by defendant and his physician, Dr. Clyde Knecht). It was also offered to explain that defendant would have been incapable of driving the car over the route which it is believed the car traveled, especially up the "Yaak Hill," or to perform

other acts requiring physical coordination. It was NOT offered as a defense either through testimony or during the closing argument. In fact, defendant's counsel specifically advised the jury during closing argument that he was not relying on diminished mental capacity due to alcohol intoxication as a defense. Thus, there was no evidence to support giving the instruction, and it was misleading to the jury and served to mandate that they ignore all evidence of his intoxication for ANY reason including those outlined in this paragraph. In *United States v. Lavallie*, 666 F. 2d 1217 (8th Cir. 1981), the federal appellate court reversed defendant's conviction, holding that it was error to give the instruction that intoxication was not a defense to the crime charged. The instruction could not be justified as cautionary or relevant and was held to be irrelevant and prejudicial. Similarly, here, the instruction was not supported by the evidence and ought not to have been given.

Secondly, defendant objected because {45-2-203, M.C.A. is unconstitutional in that it has the effect of negating the requirement that the state prove a mental state when proving deliberate homicide where the defendant is voluntarily intoxicated. There are no cases construing this statute since it was amended in 1987. Defendant argued that the 1987 amendment had the effect of eliminating the mental state requirement, in violation of the mandate of *Morisette v. United States*, 342 U.S. 246 (1951). See also {45-2-103, M.C.A., requiring that the defendant have a mental state as defined in the statutes, i.e., here, purposely or knowingly.

The objectionable instruction requires the jury to convict a voluntarily intoxicated defendant without finding

that he had the required mental state which would be required of a sober defendant. As such, voluntary intoxication is substituted for the mental element, which is constitutionally impermissible.

As was stated in *Sandstrom v. Montana*, 442 U.S. 510 (1978), a statute which shifts the burden of proof on the element of mental state to the defendant is unconstitutional. There, the following instruction was disapproved: "The law presumes that a person intends the ordinary consequences of his voluntary acts." In that case, the defendant at least had the opportunity to rebut the presumption, but that was not enough to avoid the constitutional infimity. In this case, there is no such rebuttal available to a defendant, and must [sic] there is no such rebuttal available to a defendant, and must of necessity fail as did the instruction in *Sandstrom*.

For the foregoing reasons, defendant is entitled to a new trial on both counts of deliberate homicide.

Respectfully submitted this 7th day of May, 1993.

/s/ Ann C. German
Ann C. German

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 7th day of May, I mailed a true copy of the foregoing Motion for New Trial to the office of the Lincoln County Attorney, Libby, Montana 59923.

/s/ Ann C. German

MONTANA NINETEENTH JUDICIAL
DISTRICT COURT, LINCOLN COUNTY

THE STATE OF MONTANA, Plaintiff, vs. JAMES ALLEN EGELHOFF, Defendant.	)	DC-92-60 STATE'S BRIEF IN OPPOSITION OF MOTION FOR NEW TRIAL (Filed May 25, 1993)

Defendant has filed a Motion for New Trial. Defendant sets forth three separate grounds upon which he bases his motion for a new trial. The State opposes the motion for all three grounds.

1. Defendant claims there is not substantial credible evidence upon which a jury could have found the Defendant guilty. The State opposes this claim.

The standard of review on the question of sufficiency of evidence to support a jury verdict is set forth in *State v. Cornell*, 220 Mont 433, 434-5, 715 P2d 446 (1986). *Cornell* states:

> "The standard of review in a jury verdict in a criminal case is 'whether there is substantial evidence to support a conviction, viewed in a light most favorable to the State. (citations omitted). [sic]

Substantial evidence is defined as:

> "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Spurlock*, 220 Mont 238, 241, 731 P2d 1515 (1987); *Cornell*, 220 Mont at 435.

There is more than sufficient evidence upon which to base a verdict of guilty for each count. Defendant in essence reargues his case in his motion, citing to the points Defendant thinks are appropriate. Defendant ignores the evidence upon which a verdict could be and was based.

There are many factors that point to the Defendant being the murderer. The victims and Defendant got into a car in Troy. Defendant was in the back seat of the car. The three individuals drove away. The same vehicle was seen later coming to a rest after crashing into a ditch. No one exited the car or had an opportunity to exit the car. The two victims were in the car, shot once each in the head. The bullet wounds were consistent with the victims having been shot from behind. The Defendant was in the car. Defendant's gun was in the car. Two empty shell casings were in Defendant's gun.

A bullet was recovered from one of the victims. The bullet matched all the characteristics of a bullet from Defendant's gun, with exception that the rifling of the bullet was destroyed. There were powder residues on Defendant's hand consistent with firing a gun. There was blood from the victims on the Defendant. It would have been virtually impossible for any fourth person being in the car to have exited the car without being seen after the car came to a rest. No person or individual saw a fourth person in the car.

The car was observed in the ditch to the highway several times some distance from where it finally came to rest. No more than three people were ever observed in the car. One time when the car was in the ditch on

Highway 2, an individual in the back of the car was screaming at the people who had stopped not to approach the car. At that point, it appeared that the driver and the person in the back were alive and a person on the passenger side of the front side was injured. This evidence is consistent with evidence that one of the victims was shot some distance back on the old US Highway 2.

A reasonable person can use these facts and the other facts presented at trial to determine that the Defendant was the person who shot the two victims. A reasonable person could easily reject the evidence argued by Defendant. It is not the function of the Court to second guess the jury on which evidence the jury chose to believe. Viewed in a light most favorable to the State, there is more than sufficient evidence upon which to base a verdict of guilty.

The State would also point out that a new trial is not an appropriate remedy if there is insufficient evidence. If there is insufficient evidence upon which to support a jury verdict, the remedy is dismissal of the case. *State v. Warren*, 192 Mont 436, 442, 628 P2d 292 (1981).

2. Defendant claims it was reversible error for the trial court to allow Becky Garrison to give an opinion in which the manner in which the offense was committed. The State disagrees with this claim.

Defendant alleges that Becky Garrison was allowed to give her opinion as to the manner in which the offense was committed. This argument mischaracterizes the evidence presented and what Ms. Garrison stated. The evidence in question dealt with a stick that Ms. Garrison

found in the vehicle immediately after the vehicle crashed into the ditch. Ms. Garrison initially thought this item was a muffler pipe or something similar to a muffler. Ms. Garrison left the accident for a period of time to go to the hospital in Libby. She then returned to the scene, found the item in question, identified it as a stick, and delivered the item into the custody of the Sheriff's Office. At trial, she was asked as to what she thought the stick might have been used for. She stated that she thought that an individual might have been driving the vehicle from the back seat, using the stick as an instrument to manipulate some of the vehicle's controls.

This evidence is permissible. Defendant cites no authority that this was impermissible opinion evidence. Defendant cites no authority why this evidence was inappropriate. This evidence was presented by the State as an impression Ms. Garrison had at the time of the crash of the car.

Defendant also complains that Ms. Garrison's testimony was not disclosed to Defendant in pre-trial discovery. Defendant seems to be assuming that there is some obligation for the State to disclose the opinion of this witness. The prosecutor has a constitutional duty to disclose any exculpatory evidence. The prosecutor is not constitutionally required to produce everything that he knows. "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Moore v. Illinois*, 408 US 786, 33 LEd 2d 706, 713, 92 S.Ct. 2562 (1972). *See also U.S. v. Agurs*, 427 US 97, 49 LEd 2d 342, 353, 96 S.Ct. 2395 (1976).

The other requirements for the State to produce discovery are contained in the statute governing discovery, that being Section 46-15-322, M.C.A. A statement is defined in §46-1-202(26), M.C.A. A comment made by a witness, not recorded or written is not a statement. The State provided to the Defendant all materials it had in its possession concerning its case. The State provided all reports of the police officers, all statements of the witnesses, field notes of the police officers, scientific reports, and so forth. All statements, whether written or recorded, were produced.

Defendant seems to be alleging that the State must produce oral comments of a witness to any member of the investigating team even when oral statement is not memorialized in writing or in a report of the officer. The statutes governing discovery do not make [sic] require this kind of production. The State also would point out that Defendant's argument on this point is contradictory to its own behavior in producing testimony from Dr. Clyde Knecht during the trial, such testimony being based on interviews with Dr. Knecht that were not memorialized in any form, according to the defense counsel, and the content of which were not disclosed to the State. In addition, Defendant had full opportunity to interview Ms. Garrison prior to trial. Defendant made no effort to impeach Ms. Garrison's testimony. Defendant did not ask for a continuance to deal with her testimony.

The State does not have any statements in this case that were not produced for the inspection and copying by the Defendant. The argument by Defendant on discovery is without merit.

3. Defendant alleged that the jury ought not to have been instructed that voluntary intoxication is not a defense and may not be taken into consideration in determining the existence of a mental case [sic] which is an element of the offense. The State disagrees with this allegation.

This allegation actually is two arguments lumped under one heading. The Defendant argues first that the instruction is misleading, and second, that the instruction is unconstitutional. At common law, intoxication is not a defense to a criminal charge. *See Hopt v. Utah*, 104 US 631, 26 LEd 873 (1882). "The fact that intoxication is not a defense to a crime is so universally accepted as to not require citation of cases. No court has ever descended from the proposition that voluntary intoxication is not a defense." 8 ALR 3rd 1236, Section 3(a), *See also* 21 AMJUR 2d, Criminal Law, Section 155. An examination of the cases indicates that some jurisdictions with crimes requiring a specific intent will allow intoxication as a defense to the specific intent, without allowing intoxication as a total defense to the charge. Some jurisdictions do not allow intoxication as a defense to mental state or to specific intent. *See* generally 8 ALR 3rd 1236. The State has found no court anywhere that has ruled that a statute providing that voluntary intoxication is not a defense to be unconstitutional.

The next subissue is the appropriateness of the jury instruction from the statutory language of Section 45-2-203, M.C.A. Defendant bases its argument entirely on citation to the *United State* [sic] *v. Lavallie*, 666 F2d 1217 (8th Cir. 1981). In *Lavallie* no evidence was produced to show that the Defendant was intoxicated at the time of

the alleged crime. The only evidence produced was that there had been some drinking. *Lavallie* held that giving of the voluntary intoxication instruction under those facts was error because it was a comment on the character of the Defendant. *Lavallie* also cites to *U.S. v. Hanson*, 618 F2d 1261 (8th Cir. 1980). (*Hanson* stated that intoxication is not a defense to a general intent crime.)

Lavallie is easily distinguishable from this case. While Defendant now argues that intoxication was not a defense, Defendant did list intoxication as one of his defenses to the charge. In this case, the defense went to great lengths to show that the Defendant was intoxicated to the point that he was passing out. Defendant put into evidence blood alcohol levels of the Defendant. Defendant called a witness to testify that Defendant was extremely intoxicated. When there is clear and convincing evidence that the Defendant was intoxicated, and when that evidence is produced in whole or in part by the questions from the Defendant, it clearly can not be an error to instruct the jury as to how the jury may weigh the evidence of intoxication. It is not an error to instruct the jury on the law that applies to the case. With evidence being produced by Defendant that the Defendant was intoxicated, the State is entitled to have the jury told that intoxication is not a defense.

Defendant also argues that this instruction may have mislead the jury to totally disregard evidence of intoxication and to ignore the evidentiary value that the Defendant purportedly was placing on the intoxication evidence. Defendant did not ask for an instruction advising the jury that the jury could consider intoxication for the purposes which the defense now advocates in his

motion. Since the Defendant did not ask for such an instruction, he cannot complain about the correct instructions that the State did present. In addition, the Defendant fully and completely argued his theory to the jury and the State did not argue to the jury that there was no law backing what Defendant argued. Defendant was not prevented from presenting his theory of the case to the jury.

The motion to grant a new trial should be dismissed.

Respectfully submitted this 25th day of May, 1993.

/s/ Scott Spencer
SCOTT B. SPENCER
County Attorney

CERTIFICATE OF SERVICE

I, Debra S. Kambel, a Secretary in the Office of the Lincoln County Attorney, do herewith certify that on the 25 day of May, 1993, a copy of the foregoing State's Response to Motion for New Trial, was served upon the above named Defendant by delivering said copies to:

Ann German
418 Mineral Avenue
Libby, MT 59923

Amy N. Guth
418 Mineral Avenue
Libby, MT 59923

/s/ Debra S. Kambel
Debra S. Kambel

ROBERT S. KELLER
District Judge
Lincoln County Courthouse
Libby, Montana 59923

MONTANA NINETEENTH
JUDICIAL DISTRICT COURT, LINCOLN COUNTY

STATE OF MONTANA Plaintiff, -vs- JAMES ALLEN EGELHOFF Defendant.	No. DC-92-60 **ORDER** (Filed June 18, 1993)

The Defendant's Motion For New Trial came on for hearing on June 14, 1993. At the time of the hearing the Court denied the Defendant's motion on all grounds except the Defendant's assertion that Instruction No. 11 violated the Defendant's constitutional rights, which argument the Court wanted to give further consideration. The Court has considered the arguments of Counsel and the briefs submitted and the matter is now ready for ruling.

IT IS HEREBY ORDERED that the Defendant's Motion For New Trial is ***Denied*** and the sentence imposed by the Court on June 14, 1993, should be carried out.

DATED June 17, 1993.

/s/ Robert S. Keller
ROBERT S. KELLER
District Judge

MEMORANDUM

The Defendant objected to Instruction No. 11, which was taken verbatim from §45-2-203 MCA. The statute is as follows:

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed [,smoked, sniffed, injected, or otherwise ingested] the substance causing the condition. (the bracketed portion was omitted from the Instruction)

In this regard the Defendant had made three contentions: (1) The instruction should not have been given, because it was prejudicial. *U.S. v. Lavallie,* (8th Cir. 1981) 666 F.2d 1217. (2) The instruction eliminates the mental state requirement. *Morissette v. U.S.,* 342 U.S. 246, 96 L.Ed. 288 (1952). (3) The instruction shifts the burden of proof and is therefore unconstitutional. *Sandstrom v. Montana,* 442 U.S. 510, 61 L.Ed. 2d 39 (1979).

The Defendant contends that the giving of the voluntary intoxication instruction was prejudicial because it mandated the jury to disregard the evidence that the defendant was intoxicated. Evidence of intoxication was introduced for the purpose of showing that the Defendant couldn't have driven the car and for the purpose of explaining his inability to remember. The Defendant asserts that because he told the jury that he was not

relying on intoxication to avoid responsibility, the instruction should not have been given. The Defendant's reliance on the *Lavallie* case is misplaced. In that case the Court held that the giving of a voluntary intoxication instruction was prejudicial because intoxication was not claimed as a defense and no evidence was introduced to show that the Defendant was intoxicated at the time of the alleged criminal act. The Court stated:

> In a proper case, an intoxication instruction should be required even without a request where sufficient evidence of intoxication was introduced. [citations omitted] 666 F.2d 1217, 1219.

In the case at bar there was substantial evidence introduced by the Defendant concerning the Defendant's level of intoxication. Telling the jury that an intoxicated condition is not a defense, is not the same as telling the jury that it must disregard the Defendant's explanation of his actions.

The Defendant contends that the instruction in question eliminated the mental state requirement. The Defendant implies that the instruction permitted the Defendant to be found guilty without finding that he acted "purposely or knowingly". In the *Morissette* case the defendant was charged with willfully and knowingly converting property of the U.S. The trial court refused to permit the Defendant to argue to the jury that he acted without criminal intent, i.e. that he thought the property was abandoned. The trial court said that the intent was presumed from the criminal act. The Supreme Court reversed holding that where intent is an element of the crime, it must be submitted to the jury. The Court further

stated that the trial count [sic] could not raise a presumption of intent from an act. Such a presumption would conflict with the presumption of innocence.

Instructions No. 13 and 14 charged the jury with the elements of the crime, including the element of intent, "purposely or knowingly." Instruction No. 11 didn't instruct the jury to disregard Instructions No. 13 and 14. Read together the instructions are entirely comprehensible. The jury was still required to determine that the Defendant committed the acts "purposely or knowingly". The language of the statute is very clear: one is still criminally responsible for his conduct even though intoxicated; intoxication is not a defense; and intoxication is not to be considered in determining the existence of a mental state. The language doesn't suggest that the jury should disregard the Court's other instructions.

The final contention of the Defendant is that the offending instruction shifted the burden of proof on the element of intent to the Defendant. The *Sandstrom* case relied upon by the Defendant is a Montana case in which the Defendant was convicted of deliberate homicide. The defendant contended that he didn't act "purposely or knowingly" and was therefore guilty of a lesser crime. The jury was instructed that the law presumed that a person intends the ordinary consequences of his voluntary act. The Court held that the jury may have found that the presumption was either conclusive or shifted the burden of proof and was therefore a violation of due process. Here, the Defendant contends that the instruction permits the jury to convict him without finding that he had the required mental state of a sober person. The

Defendant contends that voluntary intoxication is substituted for "purposely or knowingly". The argument is a *non sequitur*. Apart from the fact that the jury was instructed to read all of the instructions as a whole and to regard each in the light of all instructions, the plain intent of the instruction is that the jury not take into consideration the defendant's intoxication when determining if he acted "purposely or knowingly". The instruction doesn't say that an intoxicated person is criminally responsible for his conduct and therefore the jury should disregard determining if he acted with the required intent. The statute clearly states the proposition that an intoxicated person is to be judged by the same standard as a sober person for the purpose of determining intent. The burden of proof was [sic] not been modified. In *Sandstrom* terms the instruction did not create a presumption which would direct the jury to come to a certain result or shift the burden in any way to the Defendant.

pc: Scott B. Spencer, Esq.
Ann C. German, Esq.
6-18-93

MONTANA NINETEENTH JUDICIAL DISTRICT,
LINCOLN COUNTY

THE STATE OF MONTANA, Plaintiff, vs. JAMES ALLEN EGELHOFF, Defendant.	)	No. DC-92-60 JUDGMENT PRISON TERM (Filed June 18, 1993)

The County Attorney of Lincoln County, Montana, having filed an Information charging the offenses of **DELIBERATE HOMICIDE,** two counts, felonies, the Defendant having been found guilty on April 7, 1993, after a trial by jury of the charges of **DELIBERATE HOMICIDE,** two counts, felonies, and the Court having conducted a hearing in aggravation or mitigation of sentence and for pronouncement [of] judgment, such hearing having been held the 14th day of June, 1993.

THE COURT HEREBY ORDERS, ADJUDGES, AND DECREES that the Defendant be and hereby sentenced to a term of 40 years in the Montana State Prison at Deer Lodge, Montana, on each count. Pursuant to §46-18-221, M.C.A., Defendant is sentenced to a term of two years in Montana State Prison on each count for using a firearm in the commission of each offense. All sentences shall run consecutive to each other. The total length of the period of incarceration is 84 years. Defendant is designated dangerous for purposes of parole eligibility.

Defendant shall be given credit as of June 14, 1993, for 366 days of prior incarceration.

The reasons for the sentence are attached as Exhibit A.

Dated this 14th day of June, 1993.

Signed this 18th day of June, 1993.

/s/ Robert S. Keller
Robert S. Keller
District Judge

Copies: Spencer
German
Guth
Sheriff
Adult P&P
Defendant
MT State Prison (cert.)
State Board of Pardons (cert.)
Clerk & Recorder
6-18-93 np

MONTANA NINETEENTH JUDICIAL DISTRICT COURT
LINCOLN COUNTY

THE STATE OF MONTANA, Plaintiff, vs. JAMES ALLEN EGLEHOFF, Defendant.	CAUSE NO. DC 92-60 BEFORE JUDGE KELLER

Taken in the Lincoln County Court House
Libby, Montana
Monday, June 14, 1993 – 9:30 A. M.

APPEARANCES

SCOTT B. SPENCER, ESQ., Lincoln County Attorney, 512 California Avenue, Libby, Montana 59923,
appearing on behalf of the Plaintiff.

ANN C. GERMAN, ESQ., and AMY N. GUTH, ESQ., Lincoln County Public Defenders, 418 Mineral Avenue, Libby, Montana 59923,
appearing on behalf of the Defendant.

PARTIAL TRANSCRIPT OF PROCEEDINGS

Reported by Carroll B. Copeland, CSR, RPR,
Official-Freelance Court Reporter

[p. 2] THE COURT: Is there any reason why sentence ought not now be pronounced?

MISS GERMAN: No.

THE COURT: Very well then. It is the sentence of this Court that you be imprisoned in the Montana State Prison for a period of 40 years and that sentence be enhanced for the use of a firearm by two years for a total of 42 years on each count to be served consecutively.

And I gave this a lot of thought at the time of trial. And the evidence all points to shooting of Roberta much sooner than shooting of the other. And I understood the position of the defendant at the time of trial. And that as a result of the alcohol you didn't have a memory of what occurred. But that really doesn't do a whole lot for the general public. And I don't know that you aren't going to do this again.

We don't know anything about what caused you to do this on the basis of what you have given to us. And there is nothing in the evidence to suggest that there was any difficulty between you and the deceased people or at least no basis for any difficulty.

[p. 3] And the reason for the sentence is just simply that, protection of the public. The crime itself, of course, is egregious but we have a lot of egregious crimes. And in this particular case, I don't know what else we can do to protect the public other than to make it a lengthy sentence. And that is the reason for it.

And you are remanded to the custody of the Sheriff but you are not to be transported until I come up with a, have given an opinion on this constitutionality on the statute that is involved. And I am going to do that this week.

MR. SPENCER: Your Honor, two questions. I assume credit for time served is ordered?

THE COURT: Oh, yes.

MR. SPENCER: And the parole eligibility designation is dangerous or not?

THE COURT: No, it is dangerous. That is the reason for the sentence.

MR. SPENCER: I wanted to make sure. Thank you.

THE COURT: Very well.

(End of Transcript)

[p. 4] CERTIFICATE

STATE OF MONTANA)
: ss.
County of Lincoln)

I, Carroll B. Copeland, CSR, RPR, Official-Freelance Court Reporter and Notary Public, State of Montana, residing in Libby, Montana, do hereby certify:

That I was duly authorized to and did report the testimony and proceedings in the above-entitled cause;

That the foregoing pages of this transcript represent a true and accurate transcription of my stenographic notes.

IN WITNESS WHEREOF I have hereunto set my hand this the 15th day of June, 1993.

/s/ Carroll B. Copeland
Carroll B. Copeland, CSR, RPR
Official-Freelance Court Reporter

* * *

[p. 1158] objection.

Do you want to make an objection for the record?

MISS GERMAN: I want to object to State's Instruction number 10 on the ground that the theory of this case has not been a defense, has not raised the defense of intoxication as a mitigating factor or otherwise with respect to the offenses charged. And therefore, I believe that it is prejudicial error to instruct the jury that voluntary intoxication is not a defense because it has not been raised by the defense in our case.

The second reason would be that with respect to the statute, that is statute 45-2-203, it is your, under the constitution, you are shifting the burden from the state to the defendant with respect to the mens rea required by selecting out cases where there is a person that is intoxicated and lowering the mental state in those cases compared to other cases.

There is a case that I have, Judge, called Morisette versus United States which is a U. S. Supreme Court case, 1952. And it is a landmark case addressing the requirements that the state has the burden of proving mens rea or state [p. 1159] of mind in a case like this, kind of state of mind, purposeful or knowingly.

And we believe that it is an unconstitutional shift of the burden to the defendant to have to prove, well, what would be required would be proving the intoxication was involuntary in order for it to be considered by the jury in determining mental state.

And I would like to have the record state that we have searched for any cases in which the statute was considered by the Montana Supreme Court since its amendment in 1987. We have found none. And we believe the statute is unconstitutional and would be held to be so by the Supreme Court for these reasons.

THE COURT: It will be given.

And then we have the Defendant's one and two.

MR. SPENCER: And I have no objection to either one.

THE COURT: And the state's form of verdict. Here it is.

MISS GERMAN: Yes. I want to just –

THE COURT: I called counsel for Court's number one and two that I requested for

* * *

(10)

No. 95-566

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

JAMES ALLEN EGELHOFF,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Montana

BRIEF OF RESPONDENT

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OTHER AUTHORITIES

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Sixth Amendment to the Constitution of the United States, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

This case also involves the Due Process Clause of the Fourteenth Amendment, which provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

This case also involves Article VII, section 1 of the Constitution of the State of Montana, which provides:

> The judicial power of the state is vested in one supreme court, district courts, justice courts, and such other courts as may be provided by law.

This case also involves the Montana statutes set forth in the Brief for Petitioner (at pages 1-3), and § 45-2-103 M.C.A. (1991), which provides in relevant part:

> (1) "[A] person is not guilty of an offense unless, with respect to each element described by the statute defining the offense, a person acts

while having one of the mental states of knowingly, negligently, or purposely.

. . . .

(4) If the statute defining an offense prescribes a particular mental state with respect to the offense as a whole without distinguishing among the elements of the offense, the prescribed mental state applies to each element.

STATEMENT OF THE CASE

A. The Proceedings at Trial

Respondent James Allen Egelhoff was charged by Information filed in the Nineteenth District Court, in Lincoln County, Montana, with two counts of deliberate homicide in violation of § 45-5-102, M.C.A. (1991). The Information alleged specifically that he "purposely or knowingly caused the death" of John Christenson[1] and Roberta Pavola. J.A. 10-12.

In an affidavit supporting a Motion to File the Information, the Lincoln County Attorney reported that "Pavola, Christenson, and Defendant were seen drinking together in Troy on July 12, 1992. They were drinking at the Yaak Apartments in Troy." J.A. 8. The affidavit also said that a witness had observed the vehicle in which Christenson, Pavola and Egelhoff were found, and that

[1] Due to an error in the trial transcript, Mr. Christenson has been referred to as "Christianson" in the opinion below and in the Briefs of Petitioner and its *amici curiae*.

she "suspected that the driver of the vehicle was intoxicated." J.A. 3.

Respondent Egelhoff entered a plea of "not guilty" to both counts of the Information. Through counsel, he gave pre-trial notice that the general nature of his defense was:

> 1. General denial and/or
>
> 2. The Defendant did not have the particular state of mind which is an essential element of this offense due to his level of intoxication.

(Nineteenth District Court Record, Doc. No. 129, page 7, filed March 8, 1993).

The prosecution's evidence at trial showed that Mr. Egelhoff was found "semi-conscious" in the back cargo area of a station wagon, along with the bodies of the two victims; he was lying on his right side, with his head towards the back of the cargo area. Tr. 73, 424. Approximately one hour after his apprehension, Mr. Egelhoff's blood was taken at the hospital and tested. By expert testimony and stipulation, the prosecution informed the jury that Mr. Egelhoff's blood alcohol level had proved to be between 33 and 36 grams of alcohol per one hundred milliliters of blood. Tr. 221, 848-849. This is over three times the legal limit for operation of a motor vehicle in Montana. See § 61-8-406, § 61-8-407 M.C.A. (1991). The state's forensic pathologist, Dr. Gary Dale, testified that a blood alcohol level in excess of .10 is routinely described as "acute alcohol intoxication." Tr. 215-216.

At the conclusion of the state's case in chief, Mr. Egelhoff moved to dismiss on the ground that the state

had not proved the mental states required by the statutory terms "purposely" or "knowingly," which are elements of the offense of deliberate homicide; the motion was denied.[2]

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[2] MISS GERMAN: Yes, Judge. We move to dismiss on the ground that the state has failed to prove that the defendant purposely or knowingly caused the death of the two persons, Roberta Pavola and/or John Christianson [sic].

And specifically we would base our motion on the fact that there is no evidence of the mental state required to be proved in a deliberate homicide which requires the proof of purposeful or knowing behavior.

And the state has introduced evidence that Mr. Egelhoff was suffering from .33 blood alcohol shortly after the incident. And it is our contention in light of that fact he could not have been acting either purposefully or knowingly.

I would like to make a record that, although I realize the statute 45, I think 2-203 states that volunteer [sic] intoxication cannot be considered when judging mental state.

There is neither proof in this case that intoxication was voluntary nor do we believe that that is a constitutional statute because it essentially eliminates not [sic] only in the case of intoxication, the requirement that the state prove the mental state otherwise required in the proof of deliberate homicide.

All other reasons why a person wouldn't have a mental state or [sic] the state still has the burden to come forward and prove the purposeful and knowing knowledge.

And that would be [sic] the statute exempt from the requirement of proof of state of mind case where a defendant is intoxicated.

So we believe that that is a discriminatory application of that particular crierior. [sic]

THE COURT: That motion is denied. Any others?

Tr. 954-956.

The defense case included additional evidence of Mr. Egelhoff's intoxication. A defense witness testified that Mr. Egelhoff appeared "inebriated" approximately two and one half hours before his apprehension. Tr. 997-1003. Mr. Egelhoff himself testified that he was unable to remember the events of the evening, due to an alcohol induced "blackout."[3] His testimony on this point was supported by the hospital's treating physician, Dr. Clyde Knecht, who testified that he diagnosed Mr. Egelhoff as suffering from alcohol intoxication, and that his amnesia of the events of the night in question may well have been alcohol induced. Tr. at 1041-1044.

At the conclusion of the trial, the prosecution offered an instruction to the jury, taken from § 45-2-203, M.C.A. (1991), which provides that voluntary intoxication is not a defense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense. Tr. at 1158-1159. Defense counsel objected to the instruction on the grounds, *inter alia*, "that the instruction had the effect of shifting the burden from the state to the defendant with respect to the *mens rea* required by selecting out cases where there is a person that is intoxicated and lowering the mental state in those cases compared to other cases." J.A. 38.

The objection was overruled and the instruction was given orally and in writing. It read as follows:

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[3] Although other witnesses testifed that, at the time of his discovery, he told ambulance attendants of another person, stating "did you find him?," Mr. Egelhoff testified he could not recall saying that and did not know to what he had been referring. Tr. 547, 548, 1128-1130.

INSTRUCTION NO. 11

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the Defendant proves that he did not know that it was an intoxicating substance when he consumed the substance causing the condition.

The court's instructions went on, however, to tell the jury that the "elements" that had to be proved beyond a reasonable doubt included "[t]hat the defendant acted purposely or knowingly." Instruction Nos. 13 and 14, Pet. App. 30a. Those terms, in turn, were defined in terms of their statutory definition:

> A person acts purposely when it is his conscious object to engage in conduct of that nature or to cause such a result.

Instruction No. 9, Pet. App. 28a.

> A person acts knowingly when he is aware of his conduct or when he is aware under the circumstances his conduct constitutes a crime; or when he is aware that there exists the high probability that his conduct will cause a specific result.

Instruction No. 10, Pet. App. 29a. The jury found Mr. Egelhoff guilty of both charges of deliberate homicide.

Mr. Egelhoff moved for a new trial on the grounds, *inter alia*, that the intoxication instruction mandated that the jury disregard evidence of intoxication for any purpose, and that the instruction and the predicate statute,

§ 45-2-203, M.C.A. (1991), were unconstitutional. J.A. 18. The motion was denied and judgment was entered. Mr. Egelhoff was sentenced to forty-two years in prison on each count, with the terms to be served consecutively.[4]

B. The Decision of the Montana Supreme Court

Mr. Egelhoff appealed his conviction to the Montana Supreme Court, arguing among other things that his right to due process was denied when the jury was instructed that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense.

The Montana Supreme Court requested oral argument and supplemental briefing on that issue. Following the supplemental briefing, the Montana Supreme Court unanimously held that "Egelhoff was denied due process when the jury was instructed that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense." Pet. App. 16a. The Montana Supreme Court based its holding on the constitutional principles of *Sandstrom v. Montana*, 442 U.S. 510 (1979), requiring a jury finding that every element of a criminal offense has been proved beyond a reasonable doubt, and *Chambers v. Mississippi*, 410 U.S. 284 (1973), guaranteeing criminal

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[4] At the sentencing hearing, the trial judge commented, "We don't know anything about what caused you to do this on the basis of what you have given to us." J.A. 36

defendants the "right to present a defense. . . . " Pet. App. 10a-13a.[5]

The Montana Supreme Court's majority opinion specifically limited its finding to a portion of the statute (and the instruction).

> We conclude that the defendant had a due process right to present and have considered by the jury all relevant evidence to rebut the State's evidence on all elements of the offense charged. We conclude that the following portion of § 45-2-203, M.C.A. (1991), is a violation of due process and is therefore unconstitutional:
>
> "[an intoxicated condition] . . . may not be taken into consideration in determining the existence of a mental state which is an element of the offense . . . "

Pet. App. 16a. The court reversed Egelhoff's conviction and remanded for a new trial. Pet. App. 19a.

In a special concurrence, Justice Nelson, joined by Justice Gray, emphasized the narrow scope of the Court's decision. Justice Nelson cautioned that the decision not be:

> . . . misread as allowing an affirmative defense of voluntary intoxication in criminal cases. That is absolutely not so. This case is not about a defense. Rather, it deals with burden of proof and the fundamental obligation of the State to

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[5] The Montana Court did not reach the broader contention made by Mr. Egelhoff, that a criminal conviction without proof of criminal intent was "inconsistent with our philosophy of criminal law." See Pet. App. 11a, citing *Morissette v. United States*, 342 U.S. 246 (1951).

> prove each element of a criminal charge – including the mental state element – beyond a reasonable doubt.
>
> As a general proposition, the legislature may enact statutes that specify what defenses are and are not available to a charge of criminal conduct. In Montana, the legislature has, permissibly, determined that voluntary intoxication is not a defense to the commission of a crime and that, while voluntarily intoxicated, a person is still criminally responsible for his or her conduct. . . . [T]he portion of § 45-2-203, M.C.A., which provides that "an intoxicated condition is not a defense to any offense" was and is constitutional. That portion of the statute is not at issue in this case. On the other hand, as pointed out in our opinion, it is always the obligation of the State to prove beyond a reasonable doubt each and every element of the crime charged, including that the defendant acted with the requisite mental state. If, in a given case, the only way that the prosecution can prove the defendant's mental state is by *prohibiting* the jury from considering the fact that the defendant was too intoxicated to form the requisite mental state, then the State effectively and impermissibly has been relieved of all or part of its burden to prove beyond a reasonable doubt an essential element of the crime charged.

Pet. App. 19a-20a (original emphasis).[6]

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[6] Justices Nelson and Gray said they found the intoxication instruction unconstitutional "[u]nder both the Montana and federal constitution . . . " Pet. App. 20a. In a separate concurrence, Justices Trieweiler and Hunt similarly said that they found the result reached by the majority opinion to be

In another special concurrence, Chief Justice Turnage suggested that the legislature reinstate the provisions of the statute that existed prior to 1987: "[A]n intoxicated or drugged condition may be taken into consideration in determination of the existence of a mental state which is an element of the offense." Pet. App. 22a. Instead, the State filed this petition for certiorari.

SUMMARY OF ARGUMENT

The Montana Supreme Court's decision below rested on two state law premises that dictated its federal constitutional conclusion.

The first of these premises involves the *mens rea* elements of the offense of deliberate homicide in Montana. Contrary to the arguments being made in this Court, and consistent with the language of the Montana statutes, the Montana Supreme Court held that those elements are "knowingly" or "purposely" causing the death of another human being. § 45-5-102, M.C.A. The Montana Court's decision – which is conclusive on this point – made it clear that these elements have not been "redefined" by the intoxication statute that gave rise to the jury instruction at issue here, and they remain "subjective mental state element[s] required for conviction of a crime" in Montana. Pet. App. 15a.

Even if it were reviewable, that conclusion is fully consistent with the language of the Montana statute at

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dictated equally by "the constitution of this state, or of the United States. . . ." Pet. App. 26a.

issue here. That statute does not purport to change the definition of any statutory element, but states directly that intoxication evidence "may not be taken into consideration in determining the existence of a mental state which is an element of the offense." § 45-2-203, M.C.A. (1991).

The second state law premise of the Montana Supreme Court's decision was that the intoxication evidence admitted in this case "was relevant to the issue of whether Egelhoff acted knowingly and purposely." Pet. App. 11a. This reflected the Montana Court's interpretation of its deliberate homicide statute as requiring proof of the "subjective mental state" of the accused, and its factual determination that intoxication may alter cognition in a way which makes the existence of such mental states less likely than it would be for a nonintoxicated person in the same circumstances.

The Montana Supreme Court's conclusion that this statutory instruction violates the federal constitution followed inexorably from these premises. This Court reached a similar conclusion when it examined a similar instruction which circumvented the proof requirements of this same Montana statute in *Sandstrom v. Montana*, 442 U.S. 510 (1979). The court reiterated the constitutional principle on which *Sandstrom* was based, with reference to a hypothetical jury instruction indistinguishable from the one given here, in *Martin v. Ohio*, 480 U.S. 228, 233-34 (1987). This Court has steadfastly adhered to this principle and to the bedrock constitutional requirement that an adjudication of guilt of a criminal offense may follow only from the determination of a jury that all elements of

a statutory offense have been proved beyond a reasonable doubt. The Montana Supreme Court correctly applied that principle here.

The Montana Supreme Court's decision also rested on a second line of authority from this Court, involving an equally basic due process right: "the right to a fair opportunity to defend against the State's accusations." Pet. App. 12a. The accusation against Mr. Egelhoff was that he knew that his actions would cause the death of another, and intended that they do so. The Montana Supreme Court correctly found that it would be fundamentally unfair to permit the State to offer evidence in support of such an accusation, without permitting the jury to consider the evidence that cast doubt upon it.

The evidence of Mr. Egelhoff's intoxication was highly reliable and directly relevant to the accusation against him. The evidence was initially offered by the prosecution as part of its case, in an attempt to support its theory of how and why Mr. Egelhoff would have committed this crime. Although the jury heard this evidence, the trial court's instructions forbade it to consider the extreme level of intoxication insofar as that evidence raised a doubt about Mr. Egelhoff's guilt. That instruction was based on a statutory rule that is categorical, and excludes all judicial discretion to determine the relevance of such evidence in a given case. It denied Mr. Egelhoff the fundamental "opportunity to be heard" guaranteed by due process, in the most literal sense: the jury was required to close its ears to his arguments regarding the implications of the evidence already before it. This Court has never countenanced such a restriction on basic due

process rights; the Montana Supreme Court was correct in refusing to do so.

Contrary to the forebodings of Petitioner's *amici*, the decision below in no way impairs the State's legitimate ability to prevent and punish crimes committed by intoxicated persons. Montana law already provides severe penalties for negligent homicide, which includes unintentional killings by intoxicated persons. If it wished to do so, Montana could enact even more severe laws, directly punishing deaths caused as a result of voluntary intoxication, without regard to any additional element of intent or knowledge. But what the State cannot do is define a crime in terms of a subjective mental state, but then direct juries to convict defendants of those offenses without regard to whether those elements have actually been proved.

The Montana Supreme Court's decision so holding worked no radical change in the criminal law or the scope of the Due Process Clause. Similar principles have been recognized nationwide for over one hundred years, since this Court's decision in *Hopt v. People*, 104 U.S. 631 (1881). The vast majority of states' statutes and caselaw recognize and embody the principle applied below – as did the law of Montana, throughout its history, until the amendment of the statute in issue here in 1987.

The Montana Supreme Court's decision merely required the Montana Legislature to stay within well-established constitutional bounds in addressing this problem. Its decision was correct and should be affirmed.

ARGUMENT

I. THE MONTANA SUPREME COURT CORRECTLY HELD THAT IN CRIMINAL PROSECUTIONS, THE FEDERAL CONSTITUTION DOES NOT PERMIT COURTS TO INSTRUCT JURIES TO DISREGARD RELEVANT EVIDENCE IN DETERMINING WHETHER THE ELEMENTS OF A CHARGED OFFENSE HAVE BEEN PROVED.

The unanimous decision of the Montana Supreme Court below was a straightforward application of settled principles of federal constitutional law to an unusual state statute. The Montana Court's conclusion that a jury instruction based on that statute was unconstitutional flowed inexorably from its authoritative (and quite reasonable) interpretation of the Montana homicide law under which Mr. Egelhoff was prosecuted.

In their effort to overturn that conclusion, Petitioner and its *amici* distort what the Montana Supreme Court actually held, and disregard its authoritative reading of Montana law. Because the state law premises of the decision below were crucial, we begin by reviewing those premises. We then turn to the federal constitutional conclusions that follow from them.

A. The Montana Supreme Court's Decision Rested On Interpretations of Montana Law, On Which It Is the Final Authority.

The challenge to the decision below made by Petitioner and its *amici* is based in large part on arguments against the Montana Supreme Court's interpretation of Montana law in this case. Petitioner suggests, and its

amici say directly, that there is no constitutional problem here because the statute at issue merely redefined the elements of deliberate homicide in Montana. In a related vein, they claim that the evidence of Mr. Egelhoff's intoxication was properly excludable because it was not relevant to the *mens rea* elements of deliberate homicide, or was somehow prejudicial to a fair determination of whether those elements were proved.

Neither of these arguments can bear a moment's scrutiny. They are inconsistent with the language of the Montana statutes, with the jury instructions in this case, and with common sense. More importantly, they are matters of Montana state law on which the Montana Supreme Court is the final authority, and the Montana Supreme Court's decision below squarely rejected them both.

1. The Montana Supreme Court Held the Statute at Issue Here Did Not Change the Elements of Deliberate Homicide.

The source of the constitutional problem found by the court below was that Mr. Egelhoff's "jury was instructed that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense." Pet. App. 16a.

The mental elements of the crime of deliberate homicide in Montana are knowingly causing death, or purposely causing death. § 45-5-102, M.C.A. (1991). The Information by which Mr. Egelhoff was charged alleged accordingly that he "purposely or knowingly caused the death" of John Christenson and Roberta Pavola. J.A.

10-12. Mr. Egelhoff's jury was instructed that, to convict him of deliberate homicide, it had to find that he caused the death of a human being, and that he acted purposely or knowingly. Instructions Nos. 13 and 14, Pet. App. 30a.

Montana law defines "purposely" and "knowingly" in subjective terms. "A person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is the person's *conscious object* to engage in that conduct or to cause that result." § 45-2-101(63), M.C.A. (1991) (emphasis added). "A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person *is aware* of the person's own conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person *is aware* that it is highly probable that the result will be caused by the person's conduct." § 45-2-101(34), M.C.A. 1991 (emphasis added). The jury in this case was instructed accordingly:

> A person acts purposely when *it is his conscious object* to engage in conduct of that nature or to cause such a result.

Instruction No. 9, Pet. App. 28a (emphasis added).

> A person acts knowingly when *he is aware* of his conduct or when *he is aware* under the circumstances his conduct constitutes a crime; or, when *he is aware* there exists the high probability that his conduct will cause a specific result.

Instruction No. 10, Pet. App. 29a (emphasis added). Because deliberate homicide is defined in terms of "result" – "caus[ing] death" – these definitions required

proof that Mr. Egelhoff was aware his conduct would likely cause death, or had a conscious purpose to do so.

Contrary to the arguments of Petitioner's *amici*[7] the intoxication instruction at issue here, and the statute on which it was based, did not purport to change the elements of deliberate homicide – or of any other offense defined by Montana law, to which the statute applies globally.[8] To the contrary, what the statute and the instructions say is that intoxication "may not be taken into consideration in determining the existence of *a mental state which is an element of the offense*" unless the defendant proves the intoxication was unknowing.[9] § 45-2-203, M.C.A. (1991) (emphasis added).

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[7] The Petitioner never clearly adopts the extreme position of its *amici*: that, regardless of what the Supreme Court of Montana says, the intoxication statute has redefined the elements of deliberate homicide under Montana law. Compare Brief for Petitioner at 35 with Brief of the United States at 24-25; Brief of the Criminal Justice Legal Foundation (CJLF) at 2, 6. Brief of AARR at 6. Ironically, these *amici* take this position, claiming an understanding of Montana law superior to the state court that is its final expositor, in the name of the state's rights. See *id.* at 11; Brief of Hawaii, et al. at 9. "It would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law." *Stringer v. Black*, 503 U.S. 222, 235 (1992).

[8] The "redefinition" argument of Petitioner's *amici* overlooks completely the fact that this statute applies to all criminal offenses in Montana, from possession of stolen property to deliberate homicide. See, e.g., Brief of CJLF at 5-6. Similarly overlooked by this argument is the fact this statute applies to all types of *mens rea* elements in Montana, which does not distinguish in its state law between "specific" and "general" intents. See, e.g., Brief of the United States at 21.

[9] This exception to the statutory rule for involuntary intoxication, though not at issue here, further belies any

The Montana Supreme Court therefore was clearly correct in concluding that the elements of the offense of deliberate homicide were not changed by the intoxication statute. Pet. App. 11a. That Court, not the Petitioner or its *amici*, "is the final authority on the meaning of [Montana] law." *Stringer v. Black*, 503 U.S. at 234 (1992). Even if the construction given the Montana statutes by Petitioner and its *amici* were reasonable – and we submit they are not – "the highest court of the State has concluded otherwise and it is not [this Court's] . . . function to construe a state statute contrary to the construction given it by the highest court of a State." *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974); see *Bell v. Maryland*, 378 U.S. 226, 237 (1964).

The basic premise of the Montana Supreme Court's decision – that the elements of deliberate homicide remain the actual awareness that one's acts will cause death, or an actual purpose to cause death – must be accepted as a given. Under Montana law, and under the instructions it was given, Mr. Egelhoff's jury had to find what his purpose was, what he "[was] aware" would likely result from his actions, not what some hypothetical sober person would have known or intended in similar circumstances.

That was the context in which the Montana Supreme Court reviewed the instruction requiring the jury to

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argument that this statute redefined Montana law to include some kind of new, hybrid mental element like "knowingly-or-purposeful-if-not-intoxicated." No one has suggested any rational reason to believe the effect of drugs or alcohol on cognition and awareness differ depending on the circumstances of their ingestion.

ignore evidence of Mr. Egelhoff's extreme level of intoxication. That context cannot be altered now by the revisionist arguments of Petitioner and its *amici*.

2. The Montana Supreme Court Held That The Evidence of Respondent's Intoxication Was Relevant to the Truth of the State Law Charges Against Him.

The opinion of the Montana Supreme Court also included the following ruling of state law that is basic to the issue presented here, but is ignored by Petitioner and its *amici*:

> The evidence presented at trial established that Egelhoff had a level of intoxication measured at .36. It is clear that *such evidence was relevant* to the issue of whether Egelhoff acted knowingly and purposely;. . . .

Pet. App. 11a (emphasis added). In Montana, as in most states, evidence is considered "relevant" if it makes a fact more or less probable than it otherwise would be. Mont. R. Ev. 401. The Montana Supreme Court's holding, therefore, means that Mr. Egelhoff's intoxication made it less probable that he had the knowledge or purpose that is essential to a conviction of deliberate homicide in Montana.

That conclusion is fully supported by the scientific and medical literature on the effects of intoxication on perception and cognition,[10] and the longstanding and

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[10] "Alcohol acts as a depressant and, in large amounts, can seriously interfere with the drinker's perceptive capacity and mental powers. With 0.30 percent or more of alcohol in the

nearly universal conclusions of courts in other jurisdictions. Jerome Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045, 1049-1050 (1944); Note, *Alcohol Abuse and the Law*, 94 Harv. L. Rev. 1660, 1683-1687 (1981).

Moreover, at bottom that conclusion rests on a construction of Montana homicide law and the nature of the *mens rea* elements it contains. As the Solicitor General's Brief points out, relevance is not "an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in a case." *Huddleston v. United States*, 485 U.S. 681, 689 (1988); see, Brief of U.S. at 25. The "matter properly provable" in a homicide case in Montana is a matter of state law. Whatever courts or commentators elsewhere think about alcohol and its effects in the context of other state laws, the Montana Supreme Court is the final authority on that subject with regard to prosecutions under its state statutes. *Stringer v. Black*, 503 U.S. at 234-235. Its determination that alcohol intoxication can impair a person's "knowledge" or "purpose," even as he remains capable of violent action, is not subject to reevaluation or challenge by Petitioner or its *amici*. That determination is the second basic state law premise on which

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blood (the equivalent of a pint of whiskey in the body), a drinker's sensory perceptions are quite dulled and he has little comprehension of what he sees, hears or feels." Greenberg, *Intoxication and Alcoholism: Physiological Factors*, 315 Annals 22, 27 (1958) quoted in Mandiberg, *Protecting Society and Defendants Too: The Constitutional Dilemma of Mental Abnormality and Intoxication Defenses*, 53 Ford. L. Rev. 221, 227 n.33 (1984); see also, Paulsen, *Intoxication as a Defense to Crime*, 1961 U.Ill.L.F. 1, 4 n.27.

the Montana Supreme Court's decision was based, and from which it inevitably followed.

B. The Montana Supreme Court Correctly Found this Statute Denies Criminal Defendants the Most Basic Rights Guaranteed by the Federal Constitution.

The Montana Supreme Court's interpretation of its statutes framed the constitutional issue before it in stark relief: Mr. Egelhoff's jury had been required to decide whether the mental elements of the offense with which he was charged were proved – whether he was "aware" of his actions and their consequences – while disregarding the evidence before it that bore most directly on that issue, the only evidence on that issue that could conceivably support the defense. It found such a restriction on the role of the jury and the rights of a defendant in a criminal case to be unacceptable under several lines of constitutional authority. On each of those points, the Montana Court's decision was correct and consistent with an unbroken line of due process decisions from this Court.

1. The Right to a Jury Finding That All Elements of an Offense Are Proved Beyond a Reasonable Doubt.

The principal line of authority followed by the Montana Supreme Court prominently includes another case involving the very same Montana homicide law under which Mr. Egelhoff was charged: *Sandstrom v. Montana*, 442 U.S. 510 (1979).

The constitutional issue in *Sandstrom* arose from circumstances strikingly similar to those here. David Sandstrom was charged with deliberate homicide, which then as now required proof that he had acted "knowingly" or "purposely." *Id.* at 512, n.1. The statutory definitions of those mental elements were exactly the same then as they are now: they require proof that the defendant was "aware" of his actions and their likely consequences. *Id.* at 525, n.12. However, Mr. Sandstrom's jury was instructed – pursuant to a Montana statute that was separate from the sections defining the crime of deliberate homicide and its elements[11] – that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.* at 513.

This Court's decision in *Sandstrom* unanimously held that instruction violated the federal constitution by relieving the state of its burden of proving all elements of a charged offense beyond a reasonable doubt. *Id.* at 523. In so holding, it quoted from *In re Winship*, 397 U.S. 358, 364 (1970), as follows:

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt *of every fact* necessary to constitute the crime with which he is charged."

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[11] See *Sandstrom v. Montana*, 442 U.S. at 518 n.6 [citing § 26-1-502, M.C.A. (1978), which defined "disputable presumptions" to include "that a person intends the ordinary consequences of his voluntary act."]

442 U.S. at 520 (emphasis supplied by the Court in *Sandstrom*). The *Sandstrom* decision found the instruction given to the jury in that case to " 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime,' and . . . 'invade [the] fact-finding function' which in a criminal case the law assigns solely to the jury' " because under it "[t]he State was . . . not forced to prove 'beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged.' " 442 U.S. at 523, quoting *Winship*, 397 U.S. at 364.

The Montana Supreme Court correctly held that this *Winship* principle renders the instruction here unconstitutional. Pet. App. 10a. Indeed, functionally if not formally, the two instructions are virtually identical: both require the jury to find the actual knowledge or purpose that are elements of deliberate homicide in Montana, whether or not they actually exist in the case at hand, if they *would have* existed under other, "normal" circumstances. In *Sandstrom*, the instruction effectively negated psychiatric evidence that explained how the defendant in that case could have engaged in obviously homicidal conduct without knowing he was causing death or intending to do so,[12] by telling the jury intent was "presumed." In this

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[12] Mr. Sandstrom killed an 89-year old woman in a "brutal assault in which she received blows to her head from a shovel, and given stab wounds to her back from a kitchen knife," and was "sexually assaulted and received a compound fracture to her leg, apparently after the slaying." *State v. Sandstrom*, 580 P.2d 106, 107 (Mont. 1979). The defense at his trial presented psychiatric testimony that he intended only to " 'silence' " the victim. 580 P.2d at 108. On remand in *Sandstrom*, the Montana

case, the instruction was more focused, directed at the very kind of evidence before Mr. Egelhoff's jury that could have given rise to a doubt about whether he acted with the knowledge he was causing death or the intent to do so. The effect would have been much the same if Mr. Egelhoff's jury had been told "[t]he law presumes that a person intends the ordinary consequences of an act committed while he is voluntarily intoxicated." Indeed, in some respects the impact of such an instruction would have been less devastating to Mr. Egelhoff's rights than what occurred here. Under a *Sandstrom* type instruction, the defendant at least has the ability to rebut the statutory presumption; but under the instruction given here the jury must find intent regardless of any evidence of intoxication, however conclusive.

"Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases." *Carella v. California*, 491 U.S. 263, 265 (1989) (per curiam). As Justice Scalia explained in his concurring opinion in *Carella*, several central and interlocking constitutional values are implicated by such instructional devices:

> The Court has disapproved the use of mandatory conclusive presumptions not merely

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Supreme Court found that such testimony could make circumstantial evidence of knowledge or purpose inconclusive, so the constitutional error in that case was not harmless. *State v. Sandstrom*, 603 P.2d 244 (Mont. 1979). The Montana Court found much the same thing in its decision below (Pet. App. 16a); and the Petitioner has not argued here that the instruction was harmless on the facts of this case.

> because it "conflict[s] with the overriding presumption of innocence with which the law endows the accused," *Sandstrom v. Montana*, 442 U.S. 510, 523, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979) (quoting *Morissette v. United States*, 342 U.S. 246, 275, 96 L.Ed. 288, 72 S.Ct. 240 (1952)), but also because it " 'invade[s] [the] factfinding function' which in a criminal case the law assigns solely to the jury," 442 U.S., at 523, 61 L.Ed.2d 39, 99 S.Ct. 2450 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 446, 57 L.Ed.2d 854, 98 S.Ct. 2864 (1978)). The constitutional right to a jury trial embodies "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155, 20 L.Ed.2d 491, 88 S.Ct. 1444, 45 Ohio Ops 2d 198 (1968). It is a structural guarantee that "reflect[s] a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Id.*, at 156, 20 L.Ed.2d 491, 88 S.Ct. 1444, 45 Ohio Ops 2d 198. A defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State.

491 U.S. at 268. These same principles underlay the decision of the Court in *Sullivan v. Louisiana*, 113 S.Ct. 2078, 124 L.Ed.2d 182, 188 (1993):

> [W]e found this right to trial by jury in serious criminal cases to be "fundamental to the American scheme of justice," and therefore applicable in state proceedings. The right includes, of

> course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty." See *Sparf and Hansen v. United States*, 156 U.S. 51, 105-106, 39 L.Ed. 343, 15 S.Ct. 273 (1895). Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence. *Ibid.*

See also *United States v. Gaudin*, 115 S.Ct. 2310 (1995). The instruction here effectively directed a verdict for the State, forbidding the jury from acquitting the defendant – even if it had a reasonable doubt as to his guilt, if that doubt arose from evidence of his intoxication.

The Montana Supreme Court was fully justified in holding the constitution would not countenance such an invasion of the jury's factfinding role. Indeed, its conclusion was compelled by this Court's restatement of the *Sandstrom* principle with reference to a virtually identical (albeit hypothetical) jury instruction[13] in *Martin v. Ohio*, 480 U.S. 228, 233-34 (1987). The Montana Supreme Court's opinion quoted from *Martin* at length, as follows:

> It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case, i.e., that self-defense evidence must be put aside

[13] Again, the impact of the instruction in this case was even more severe than the one described in *Martin*: for under this instruction, evidence of voluntary intoxication had to be "put aside for all purposes" however powerful the jury may have found it, even if it proved *conclusively* that the defendant did not have the requisite knowledge or intent.

> for all purposes unless it satisfied the preponderance standard. Such instruction would relieve the State of its burden and plainly run afoul of *Winship's* mandate. 397 U.S., at 364. The instructions in this case could be clearer in this respect, but when read as a whole, we think they are adequate to convey to the jury that all of the evidence going to self-defense, must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime.
>
> . . .
>
> When the prosecution has made out a prima facie case and survives a motion to acquit, the jury may nevertheless not convict if the evidence offered by the defendant raises any reasonable doubt about the existence of any fact necessary for the finding of guilt. Evidence creating a reasonable doubt could easily fall far short of proving self-defense by a preponderance of the evidence. . . .

Pet. App. 13a. Although this statement in *Martin* may technically have been *dictum* in light of the Court's interpretation of the jury instructions in that case, the constitutional principle it described was nonetheless "plain" and well settled. Its application to the circumstances of this case is difficult even for Petitioner to dispute.

Once the Montana Supreme Court determined that an actual knowledge and purpose to cause death remain the "fact[s] necessary for the finding of guilt" of deliberate homicide, it had no alternative but to invalidate the instruction here. "The applicability of the reasonable doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given

case." *Patterson v. New York*, 432 U.S. 197, 211 n.12 (1977).[14] This instruction which told the jury it *must* convict even "if the evidence offered by the defendant raises [a] reasonable doubt about the existence" of those facts, if that evidence involved voluntary intoxication. The Montana Supreme Court did not err in so doing.

Indeed, given its state-law premises, the Montana Supreme Court simply could not have decided differently than it did without flouting *Sandstrom*. The same reasoning which Petitioner suggests and which its *amici* espouse now (that the Montana voluntary-intoxication statute should be deemed to have qualified, mooted, or superseded the mental-state elements of Montana homicide law for purposes of federal Due Process analysis) would have been indistinguishably applicable to the Montana presumptive-intent statute involved in *Sandstrom* and would have required precisely the opposite result than this Court reached in *Sandstrom*. Ironically, such a result might have been defended in *Sandstrom* by reading the Montana Supreme Court's opinions there – affirming Sandstrom's conviction – as equivocal on the state-law question whether one Montana statute implicitly repealed

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[14] Although citations to *Patterson* pervade the arguments of Petitioner and its *amici*, they all missed this central point: in *Patterson*, the New York Court of Appeals held "that the New York statute involved no shifting of the burden to the defendant to disprove any fact essential to the offense charged since the New York affirmative defense of extreme emotional disturbance bears no direct relationship to any element of murder." 432 U.S. at 201. Here, the Montana Supreme Court authoritatively, and quite reasonably, held precisely the opposite. See Part I A 1, above.

another; here, the square holding and express language of the Montana Supreme Court decision reversing Egelhoff's conviction preclude any reading of the sort.

2. The Right to Present a Defense

The decision below also invoked another due process principle which was no less plainly violated by this instruction: "the right to a fair opportunity to defend against the State's accusations." Pet. App. 12a, quoting *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

The right to present a defense is distinct from the right to a jury determination of the fact of guilt at issue in *Sandstrom*, but no less fundamental. As Justice Powell's opinion for the Court in *Chambers* recalled:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Mr. Justice Black, writing for the Court in *In re Oliver*, 333 U.S. 257, 273 (1948), identified these rights as among the minimum essentials of a fair trial:
>
> > "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."

> See also *Morrissey v. Brewer*, 408 U.S. 471, 488-489 (1972); *Jenkins v. McKeithen*, 395 U.S. 411, 428-429 (1969); *Specht v. Patterson*, 386 U.S. 605, 610 (1967).

410 U.S. at 294-95.

This Court has never retreated from the *Chambers* principle,[15] but has applied and approved it repeatedly.

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[15] Contrary to the arguments of the United States, nothing truly comparable to the constitutional issue here was involved in *Fisher v. United States*, 328 U.S. 463 (1946). The jury in *Fisher* heard the defendant's psychiatric evidence and was unrestricted in its ability to consider it with reference to the elements of the offense. *Fisher's* appeal focused on the refusal of an affirmative instruction supporting his defense theory of the relevance of that evidence. *Ibid.* This Court's closely divided decision in *Fisher* held that request raised an issue regarding the nature of the law of the District of Columbia, best left to its local courts. *Id.* at 476. Interestingly, those courts later overruled the common law rule at issue in *Fisher*, *U.S. v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972). See also *U.S. v. Pohlot*, 827 F.2d 889 (3d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988) (Fisher rule rejected under current federal law.)

It is even more compelling that the California Supreme Court later disapprove the implications of its analogous decisions in *People v. Troche*, 206 Cal. 35, 273 P. 767 (1929) and *People v. Coleman*, 20 Cal.2d 399, 126 P.2d 349 (1942), of which the Solicitor General makes so much (Brief of U.S. at 12-14). See *People v. Wells*, 33 Cal.2d 330, 202 P.2d 53 (1946), *cert. denied*, 338 U.S. 836 (1949). The grounds on which the Court in *Wells* did so foreshadowed the development of the Due Process principles applied below:

> A defendant charged with a crime is presumed to be innocent of, and is entitled to appear and defend against, the charge in its entirety, not merely as to some of its elements but as to each and all of those elements. Subject to various limitations a statute may validly declare a prima facie presumption to be the legal result of the proof of certain facts, but the due process clause of the Fourteenth Amendment requires that there be a rational connection between the facts proved and the fact presumed. . . . To make a presumption of a factual element of guilt conclusive at all stages of the trial, or to preclude the defendant absolutely and at all stages from meeting proof of an element of guilt adduced by the prosecution, cannot be sustained.

202 P.2d at 63 (Citations omitted).

> We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. . . . That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence . . . when such evidence is central to the defendant's claim of innocence.

Crane v. Kentucky, 476 U.S. 683, 690-91 (1985) (citations omitted). "Our cases establish, at a minimum, that criminal defendants have . . . the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). Although that right has not been viewed as absolute, it has never been made to yield to the kind of categorical exclusion of highly reliable evidence,[16] directly relevant to guilt or

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[16] The state did not argue below, and the trial court did not suggest, that the evidence of Mr. Egelhoff's intoxication was factually unreliable. Nor is there anything to indicate that the Montana legislature shared the historical concern about the reliability of intoxication evidence cited by one of Petitioner's *amici*. Brief of CJLF at 10. Whatever part such concerns may have played in the development of the common law rules, they have no basis in light of modern technology. Like virtually every other state, Montana has found the kind of scientific

innocence, that is at issue here. To the contrary, the Court has said that "[a] State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case." *Rock v. Arkansas*, 483 U.S. 44, 61 (1986).[17]

Nor, in any other of this Court's cases we have found, has that right ever before been infringed upon in the extraordinary manner it was here. The intoxication evidence in this case was not kept out of court, it was admitted and heard by the jury; the jury was simply told to disregard it with reference to the *mens rea* issues it was told to decide. This adds an element of arbitrariness that goes even beyond the unfairness of preventing the defendant from presenting a defense.[18] See *Windsor v. McVeigh*, 93 U.S. 274, 277-78 (1876).

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evidence of intoxication by blood analysis used in this case to be highly reliable and generally admissible into evidence in all types of cases. In fact, such evidence is the statutorily required basis for an entire class of crime in Montana. See §§ 61-8-401, et seq. M.C.A. (1991) (operating motor vehicles under influence of alcohol, etc.)

[17] The *per se* rule at issue here bears no resemblance to the sorts of evidentiary rules cited by the Solicitor General. Brief for the United States at 1-2, 25-26, n.14. Those rules – many of which Montana law shares – require trial judges to make case by case determinations based on the probative value of certain evidence weighed against considerations of unfair prejudice, confusion, and waste of time. Mont. R. Ev. 403; see, generally, Mont. R. Ev. 401-411, 702. None involve the kind of categorical, absolute exclusion of concededly relevant and reliable evidence involved in this case.

[18] The Montana Supreme Court's decision pointed out one way in which a jury might misinterpret the contradictory instructions: " . . . the jury may be misled into believing the State has proved the mental state beyond a reasonable doubt and that

For all these reasons, the Montana Supreme Court was correct in concluding that the prohibition against the consideration of relevant evidence of intoxication violated, in addition to the *Sandstrom* principle, criminal defendants' "due process right to present and have considered by the jury all relevant evidence to rebut the State's evidence on all elements of the offense charged." Pet. App. 16a.

II. THE MONTANA SUPREME COURT'S DECISION DOES NOT IMPAIR THE LEGITIMATE POWER OF THE STATES OR FEDERAL GOVERNMENT TO PUNISH CRIMES COMMITTED WHILE INTOXICATED.

Lacking any support for their position in this Court's constitutional case law, Petitioner and its *amici* have deluged the Court with policy arguments about the dangers of crime related to drug and alcohol intoxication, suggesting those are so great that they should prevail over basic constitutional guarantees. Pet. Br. 17-19, Brief of Hawaii, et al. at 14-18; Brief of CJLF at 8-13; Brief of AARR at 1-3. Those arguments are both overstated and irrelevant to the procedural due process issue here.[19]

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is why defendant cannot introduce evidence in opposition to a specific state of mind." Pet. App. 14a.

[19] One of Petitioner's *amici* attempts to legitimize these policy arguments by informing the court that the issue here "should be analyzed under substantive, and not procedural, due process." Brief of CJLF at 2. The only authority cited in support of that remarkable proposition is stunningly irrelevant: it is *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), a civil case in which this Court found no liberty interest was at issue, which is

Nothing in the decision below prevents states from prohibiting and severely punishing intoxication-related criminal behavior. Montana does so in its homicide law, for example: it defines negligent homicide in objective terms, making it sufficient that the defendant "disregard[ed] a risk of which he should be aware" in a "gross deviation from the standard of conduct that a reasonable person would observe." §§ 45-5-104, 45-2-101(31), M.C.A. The penalty for negligent homicide in Montana is up to ten years in prison – with enhancement possible if the defendant is found to be a persistent felony offender, § 46-18-501, M.C.A. or to have used a dangerous weapon, § 46-18-221, M.C.A.

If it found that inadequate, nothing in the decision below prevents the Montana legislature from going further and creating a crime of "causing death while voluntarily intoxicated" – just as it can create an offense of being in public while intoxicated. See *Powell v. Texas*, 392 U.S. 514 (1968). Although it was argued below that such a strict liability offense could violate due process, the Montana Supreme Court pointedly refrained from resting its decision on that substantive due process ground.[20]

In addition, of course, states have enormous power to regulate, or prohibit, alcohol as well as intoxicating drugs, under the Twenty-first Amendment and under

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cited here because a state court had deemed a presumption a "substantive rule of law," *id.* at 119-120 – the exact opposite of what the Montana Supreme Court decided below.

[20] See Pet. App. 11a [noting, but not addressing, Appellant's arguments based on *Morissette v. United States*, 342 U.S. 246 (1951)].

their police powers. See *California v. LaRue*, 409 U.S. 109 (1972) (preeminence of powers granted by Twenty-first Amendment); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (life imprisonment for illegal drug possession).

But the best evidence that the constitutional decision below will not dangerously restrict states' ability to enforce their laws against intoxication-related crimes is the fact that it comports with the longstanding practice of a large majority of the states – including, until recently, Montana. The principle applied below has been recognized by this Court, as a matter of statutory interpretation at least, for well over 100 years. See *Hopt v. People*, 104 U.S. 631 (1881). It is consistent with the present law of the United States and of all[21] but a small number of states. By our count it appears that affirmance of the decision below will call into question only six state statutes applicable to homicide cases and would directly contradict the decisions of only three additional state courts.[22] Surely, if the procedural protections enforced by

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[21] *See e.g., Terry v. State*, 465 N.E.2d 1085 (Ind. 1984), declaring unconstitutional a statute that forbade consideration of intoxication evidence and concluding that a defendant in Indiana can offer a defense of voluntary intoxication to any crime.

[22] Only nine states have statutes or case law now in effect that bar jury consideration of the effect of intoxication on the issue of mental states that are elements of an offense. Of those, three rely on case law to bar consideration of intoxication: *White v. State*, 717 S.W.2d 784 (Ark. 1986); *Lanier v. State*, 533 So.2d 473 (Miss. 1988); *State v. Vaughn*, 232 S.E.2d 328 (S.C. 1977). Five have statutes which have been construed to bar such consideration: *Wyant v. State*, 519 A.2d 649 (Del. 1986) (Del. Code Ann. tit. 11, § 421 (Repl. 1987)); *Foster v. State*, 374 S.E.2d

the decision below posed such a danger to public order, the large majority of state courts and legislatures would not have adopted them, as they have.

CONCLUSION

The decision of the Supreme Court of Montana should be affirmed.

Respectfully submitted,

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188, 194-95 (Ga. 1988), *cert. denied*, 490 U.S. 1085 (1989) (Ga. Code Ann. § 16-3-4 (1968)); *State v. Souza*, 813 P.2d 1384 (Haw. 1991) (Haw. Rev. Stat. § 702-230 (1986)); *State v. Erwin*, 848 S.W.2d 476 (Mo. 1993), *cert. denied*, 114 S.Ct. 88 (1994) (Mo. Rev. Stat. § 562.076 (1983)); *Hawkins v. State*, 605 S.W.2d 586 (Tex. Crim. App. 1980) (Tex. Penal Code Ann. § 8.04 (Vernon 1974)). Arizona's statute was recently enacted, [(Ariz. Rev. Stat. Ann. § 13-503 (1995)]. Pennsylvania, in contrast, cited by Amicus Br. of Delaware *et al.* at 4 n.1 (filed Nov. 6, 1995) at 4, n.1, *allows* evidence of intoxication to reduce the degree of murder. [18 Pa. Cons. Stat. Ann. tit. 18, § 308 (Purdon 1976)].

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No. 95-566

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

JAMES ALLEN EGELHOFF,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Montana

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The centerpiece of Respondent's argument is the contention that the Montana legislature "did not purport to change the elements of deliberate homicide." Resp't Br. at 17-18. As such, Respondent argues, evidence of voluntary intoxication was highly "relevant" to the question whether he acted with the requisite mens rea. Accordingly, he concludes, the instruction directing the jury not to consider this evidence in determining his mens rea had the effect of shifting the burden of proof and also deprived him of his constitutional "right" to mount a defense.

This argument completely misses the point. The Montana legislature, acting well within the scope of its authority to define inculpatory and exculpatory behavior, plainly altered the culpability of voluntarily intoxicated persons for all crimes with an intent element, and the Montana Supreme Court did not, and could not, hold otherwise. Accordingly, evidence concerning Respondent's voluntary intoxication was not ***legally*** relevant to his guilt or innocence. Moreover, by restricting the legal relevance of voluntary intoxication, the Montana legislature, while concededly making it easier to convict some defendants, did not shift its burden of proof or interfere with any constitutionally recognized "right" to present a defense.

ARGUMENT

I. SECTION 45-2-203 SUBSTANTIVELY ALTERED CRIMINAL CULPABILITY UNDER MONTANA LAW AND DID NOT SHIFT THE BURDEN OF PROOF TO THE DEFENDANT.

A. The Montana Legislature Altered Criminal Culpability in the 1987 Amendment.

It is not disputed that the Montana legislature did not technically "redefine" the statutory terms "purposely" or "knowingly" when amending § 45-2-203 in 1987. Nonetheless, the legislature, by stating that "an intoxicated condition may not be taken into consideration in determining the existence of a mental state which is an element of the offense," effectively altered the intent requirement for all state crimes, including the crime of deliberate homicide. By means of this provision, the legislature extracted the entire subject of voluntary intoxication from the mens rea inquiry, based on its substantive judgment that criminal responsibility is not lessened by voluntary intoxication.

To be sure, § 45-2-203 is framed in a manner which arguably could be construed as procedural. That provision, however, is plainly not merely a rule of evidence. To the contrary, it represents the legislature's effort, having defined what conduct is inculpatory in the definitions of the many specific crimes in its Code, to define, on an across-the-board basis, certain conduct which is not exculpatory. It manifestly was within the legislature's authority to do so. *See, e.g., Schad v. Arizona*, 501 U.S. 624, 633 (1991); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

Contrary to Respondent's contention, the Montana Supreme Court did ***not*** determine that § 45-2-203 did not substantively modify the mens rea requirement for the crime of deliberate homicide. In the only passage on which Respondent relies, the Court stated that voluntary intoxication evidence "was relevant to the issue of whether Egelhoff acted knowingly and purposely." Pet. App. 11a. Respondent surmised from this that the Court must have found that the definition of deliberate homicide was not substantively modified; otherwise, he suggests, it would not have determined this evidence to be "relevant."

Respondent's reading of the Montana Supreme Court's decision is strained beyond reason. The court clearly did not concern itself with whether the intoxication instruction, or the statute from which it derived, "redefined" the mental state elements of deliberate homicide. The court instead assumed that, but for the instruction, the evidence was logically relevant to Respondent's mental state.

Thus, Respondent errs in saying that the Montana Supreme Court interpreted Montana law at all. In fact, the court did not do so; rather, the sole issue it decided was an issue of federal constitutional law. More specifically, that court, starting from the flawed assumption that various decisions of this Court require the admission of all relevant evidence in order for a trial to be "fair," Opinion at 12a, entirely skipped over the threshold state law question of whether § 45-2-203 changed the intent requirement for deliberate homicide and determined that, because the intoxication evidence was "relevant," Instruction No. 11 violated the Due Process Clause. Put another way, the Montana Supreme Court did not decide

any question of state law that is distinct from its erroneous analysis of federal constitutional law. *Cf. Michigan v. Long*, 463 U.S. 1032, 1040-41 (1982) ("when the adequacy and independence of any state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so"). For this reason, this case turns squarely on the due process issue identified in the question presented, and is not subject to resolution through deference to the state court's decision. *See Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2189-99 (1993) (when state decision does not construe the meaning of a statute, but simply characterizes its practical effects, it does not embody a statutory interpretation to which the Court must give deference).

The Montana Supreme Court's erroneous approach to the constitutional issue underlies its erroneous conclusion. In adopting § 45-2-203, the legislature removed the issue of voluntary intoxication from the mens rea inquiry. Thus, while the court may be correct that evidence of Respondent's intoxication was ***logically*** relevant to his state of mind, it was not correct in holding that this evidence was ***legally*** relevant. Legal relevance is wholly dependent upon the definition of the culpable conduct and, by adopting § 45-2-203, the legislature made evidence of voluntary intoxication legally irrelevant to the crime of deliberate homicide. The only issue is whether that is constitutionally permissible, and for the reasons that follow, it is.

B. Section 45-2-203 Does Not Shift the Burden of Proof to the Defendant.

In adopting § 45-2-203, the Montana legislature concededly made it easier to convict certain defendants of the crime of deliberate homicide. It did not, however, shift or lessen the State's burden of proof or create any presumption of guilt. Accordingly, this case is not governed by this Court's decision in *In re Winship*, 397 U.S. 358 (1970), and its progeny.

States are free, consistent with the requirements of the Cruel and Unusual Punishment Clause of the Eighth Amendment, to alter the ***substantive*** definitions of crimes, even if by doing so they make prosecution easier. No one doubts, for example, that states have the constitutional authority to criminalize sexual relations with minors by removing the element of "consent" from the jury's consideration, even though that change certainly makes it easier for states to convict defendants of the crime of statutory rape.

Here, § 45-2-203 does not alter the State's burden or create any presumption of guilt and Respondent's reliance on *Sandstrom* is particularly misplaced. He asserts that Montana's burden to prove each element beyond a reasonable doubt was subverted by the voluntary intoxication instruction which "effectively directed a verdict for the State." Resp't Br. at 26. He misconstrues *Sandstrom*, however, and the nature of the instruction given in this case.

The Due Process Clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact legally necessary to constitute the crime with which he is charged. *Winship*, 397 U.S. at 364. This

principle similarly precludes a State from using "evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt on every essential element of a crime." *Francis v. Franklin*, 471 U.S. 307, 313 (1984); *accord Rose v. Clark*, 478 U.S. 570, 580 (1986); *Cabana v. Bullock*, 474 U.S. 376, 384 (1986). The application of the reasonable doubt standard is necessarily dependent upon the substantive law which establishes the elements of the involved crime. Consequently, there is a significant difference between declaring that certain facts have no exculpatory value with respect to a given element of the offense and shifting the burden of proof with respect to that element to the defendant. The former falls within the broad legislative prerogative to determine whether, as a matter of sound public policy, conduct of a particular sort should be allowed to affect criminal culpability, while the latter runs afoul of *Sandstrom*.

The threshold inquiry in ascertaining whether an instruction creates an improper presumption is to "determine the nature of the presumption it describes." *Francis*, 471 U.S. at 313; *Sandstrom*, 442 U.S. at 514. This analysis must focus initially on the specific language challenged. Here, the jury was instructed that

> a person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense.

Pet. App. 29a. There is no presumption in the instruction. The first component, which makes an accused in an intoxicated condition "criminally responsible" for his conduct,

is explained in the remainder of the instruction – i.e., a voluntarily intoxicated person may not use the fact of such intoxication as a means to negate any mental element of the alleged offense.[1]

Under the second component, a voluntarily intoxicated person is held just as responsible for his conduct as is anyone else by disallowing use of his intoxicated condition as an affirmative defense. The third component excludes voluntary intoxication from the jury's determination of mental state. It is the third phrase that Respondent claims creates an improper mandatory presumption.[2]

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[1] As discussed in the Petitioner's opening brief at 15-16, the Montana Supreme Court has rejected the claim that the first clause "mandates that a jury find a defendant guilty of the charged crime if the defendant was intoxicated." *Kills On Top v. State*, 901 P.2d 1368, 1380 (Mont. 1995).

[2] Respondent's amicus suggests that the term "defense" could have been construed by a reasonable juror as not limited to affirmative defenses and thus as instructing the jury "not to consider the evidence of intoxication to support points respondent made to defend himself against the State's charges." Nat'l Ass'n of Crim. Defense Law. Br. at 16. The latter reference presumably is to the use of intoxication evidence to establish that Respondent physically could not have committed the crimes because of his intoxicated condition. This contention falls outside the question presented and was not addressed below. The Montana Supreme Court thus stated, "Egelhoff does not contend that he has the right to the affirmative defense of voluntary intoxication. He challenges only the exclusion of evidence from the jury's deliberations for purposes of determining mental state (the 1987 amendment)." Pet. App. 10a. None of the parties, moreover, has disputed before this Court that the jury was permitted to consider the intoxication evidence offered by Respondent at trial for the purpose of

A "mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts." *Francis*, 471 U.S. at 314. The jury here was not commanded to reach a certain result based on certain predicate facts. The jury instead was instructed that the State had the burden of proving the elements of the crime beyond a reasonable doubt and that Respondent was presumed innocent. Pet. App. 27a (Instr. No. 7). The elements that Montana was required to prove were that Respondent purposely or knowingly caused the death of a human being. *See* § 45-5-102(1)(a) (1995). The voluntary intoxication instruction did not shift the burden of proof with respect to any of these elements. Even the Montana court recognized that "burden shifting" is "not technically what happens in a case such as the present one." Pet. App. at 14a-15a. The Due Process Clause is not offended as long as the instructions require proof "beyond a reasonable doubt [of] all of the elements included in the definition of the offense of which the defendant is charged." *Patterson v. New York*, 432 U.S. 197, 210 (1977); *see also Cupp v. Naughten*, 414 U.S. 141, 147 (1973) (instructions, when viewed as a whole, did not shift burden as jury was still instructed on presumption of innocence and that state had burden to prove guilt beyond a reasonable doubt).

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establishing his claim that a fourth person, not Respondent, murdered the victims. Since the issue has not been raised by the parties, it cannot be raised by Respondent's amicus. *See United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981); *see also Wisconsin v. Mitchell*, 113 S. Ct. at 2197 n.2 (since the issues were not developed below and plainly fall outside the question on which certiorari was granted, the Court will not reach the issue).

There is, in short, a vast difference for *Sandstrom* purposes between instructing the jury to presume a fact establishing an element of an offense and instructing the jury to exclude from consideration certain evidence. When evidence is excluded from consideration as legally irrelevant, the jury must nevertheless rely upon the remaining evidence to determine whether the State's burden of proof has been met. It is of no moment that certain evidence was not allowed to be used to rebut the State's case, which arguably made the State's case easier to prove. This does not create a presumption or violate due process because nothing in the "Due Process Clause bars states from making changes in their criminal law that have the effect of making it easier for the prosecution to obtain convictions." *McMillan v. Pennsylvania*, 477 U.S. 79, 89 n.5 (1986); *accord Medina v. California*, 112 S. Ct. 2572, 2580 (1992).

None of the authority relied upon by Respondent remotely suggests otherwise. He quotes extensively from *Carella* to support his assertion that a conclusive instruction contravenes constitutional principles. *Carella v. California*, 491 U.S. 263, 265 (1989) (per curiam). That quotation is not pertinent here because the instructions did not create *any* presumption, much less a mandatory one. Similarly, Respondent's reliance upon *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993), is misplaced. In *Sullivan*, this Court was concerned with a harmless error analysis of a defective reasonable doubt instruction. That a valid reasonable doubt instruction was given the jury in this case not only makes the holding in *Sullivan* inapposite but also supports Montana's position that the jury was properly instructed when the instructions are viewed as a whole. Respondent next cites *United States v. Gaudin*, 115

S. Ct. 2310 (1995). The question there was whether the issue of "materiality" was an element of the offense at issue and therefore a question of fact for the jury, not a question of law for the judge.[3]

Lastly, Respondent's contention that the voluntary intoxication instruction required that the "jury must find intent regardless of any evidence of intoxication" or that the instruction had the effect of "directing a verdict for the state" is pure hyperbole. First, the argument ignores the literal language of the instruction itself. That language, which directed the jury to exclude evidence of voluntary intoxication from its consideration in determining intent, negates any legitimate claim of a "reasonable likelihood" the jury presumed the presence of the requisite mental state from a fact they were told not to consider. *Boyde v. California*, 494 U.S. 370, 380 (1990); *accord Victor v. Nebraska*, 114 S. Ct. 1239, 1243 (1994); *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Second, Respondent's

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[3] Respondent additionally relies on *Martin v. Ohio*, 480 U.S. 228 (1987), to support the argument that the burden of proof somehow was improperly shifted. Resp't Br. at 26-27. Contrary to his apparent argument, however, the relevance of *Martin* to the Montana Supreme Court lay not in burden-shifting – since that court recognized the intoxication instruction did not shift the burden of proof to Respondent with respect to the mental state element – but in what the court characterized as the "lessen[ing]" of such burden. Pet. App. 15a. The Montana court's characterization was simply its manner of expressing the notion that a defendant has a due process-secured right to introduce all evidence relevant to his defense. Whatever the merit of that notion, and there is none under the circumstances here, it does not implicate the presumption-related burden shifting concerns to which *Sandstrom* and its progeny are directed.

contention in this regard ignores the instructions read as a whole, which unequivocally required the jury to determine whether the prosecution had proved "knowingly" or "purposely" beyond a reasonable doubt and, as discussed above, contained no presumption of fact concerning any element of the offense charged. Pet. App. 27a-30a (Instrs. Nos. 7-11, 13, 14).

II. RESPONDENT HAS NO DUE PROCESS RIGHT TO PRESENT EVIDENCE OF A CONDITION WHICH HAS BEEN DEEMED BY THE STATE LEGISLATURE TO HAVE NO EXCULPATORY VALUE ON THE ISSUE OF INTENT.

Respondent contends that § 45-2-203 and the corresponding jury instruction denied him his due process right to present all evidence relevant to determining whether the elements of the charged offense have been proved. He cites *Chambers v. Mississippi*, 410 U.S. 284 (1973), for the proposition that he was denied his constitutional right to present a defense. At the same time, Respondent concedes, as he must, that the asserted right to present a defense has never been viewed as absolute. Respondent nevertheless makes no attempt to establish the parameters of such a right. He merely asserts that the right has never been made to yield to the categorical exclusion of highly reliable evidence, directly relevant to guilt or innocence, that has occurred in this case. Finally, he claims the fact that the voluntary intoxication evidence was heard by the jury but that it was told to disregard it on the issue of mental state adds an element of unconstitutional arbitrariness to the statutory scheme. Resp't Br. at 29-33.

The right to present a defense stems principally from the collection of specific rights guaranteed by the Sixth Amendment, such as the right to testify on one's own behalf, the right to confront witnesses, and the right to compulsory process. *See Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), *Rock v. Arkansas*, 483 U.S. 44 (1987), and *Washington v. Texas*, 388 U.S. 14 (1967). This Court has recently observed that the Due Process Clause has limited operation beyond the specific guarantees enumerated in the Bill of Rights. *Medina*, 112 S. Ct. at 2576. Respondent does not identify a specific Sixth Amendment guarantee that he was denied, nor could he.

This Court also has observed, in dicta, that, independent of the specific guarantees of the Sixth Amendment, the Due Process Clause generally protects the defendant's right to present a defense. *See Chambers*, 410 U.S. at 302; *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Those comments were unnecessary because the evidence excluded in both *Chambers* and *Crane* implicated specific Sixth Amendment rights, i.e., the rights of confrontation and compulsory process, and those decisions fall comfortably within the Sixth Amendment-based entitlement to those specific rights.

In asserting that a right to present a defense includes the right to present highly reliable evidence directly related to guilt or innocence, Respondent makes a glaring, and unwarranted, assumption – that voluntary intoxication evidence is a legally recognized "defense." His assumption, of course, is incorrect since it ignores that, in enacting § 45-2-203, the Montana legislature made the existence vel non of voluntary intoxication immaterial to the determination of any required mental state element.

Although this substantive change is manifested in procedural terms, i.e., preventing the jury from considering evidence of voluntary intoxication for the purpose of negating mental state, it is clearly a substantive rule of criminal culpability. *Cf. Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989) (observing that a conclusive presumption that the spouse of a woman is the father of her child "expresses the State's substantive policy" that the spouse should be held responsible for the child and that the integrity of the family unit should not be impugned). The Court has never suggested that the right to present a defense, whether invoked under the Sixth or the Fourteenth Amendment, imposes a per se constraint on a state legislature that precludes it from determining that certain conduct should have no exculpatory value for a particular purpose.

The situation here thus differs significantly from those in the right-to-present-a-defense cases cited by Respondent. In the latter, the Court assumed or specifically held that the evidence withheld is material to a fact which was exculpatory under the State's substantive law. Indeed, in most instances, the material fact involved was whether the defendant engaged in the culpable conduct at all. In *Chambers*, *Washington*, and *Crane*, as examples, the defendants attempt to prove that they had not committed the killings. In contrast, Respondent asserts a constitutional right to defend under the theory that his voluntary intoxication is exculpatory in the face of a specific state statute to the contrary.

More germane are decisions in which this Court recognized that state procedural rules barring the introduction of exculpatory evidence due to failure of defense counsel to comply with pretrial notice requirements do

not necessarily violate the Sixth Amendment. In *Taylor v. Illinois*, 484 U.S. 400 (1988), the Court upheld the exclusion of testimony of a witness known to defense counsel but not disclosed prior to trial, rejecting the claim that the Compulsory Process Clause required the court to allow the defendant to present the testimony. Based on findings that Taylor's discovery violation amounted to willful misconduct and was designed to obtain a tactical advantage, the Court determined that, "[r]egardless of whether prejudice to the prosecution could have been avoided" by a lesser penalty, "the severest sanction [wa]s appropriate." *Id.* at 413.

Similarly, in *Michigan v. Lucas*, 500 U.S. 145 (1991), the Court approved the exclusion of evidence of a rape victim's prior sexual conduct with the defendant on the ground that defense counsel did not disclose the testimony prior to trial as required by the Michigan Rape Shield law. The Court reasoned that in light of *Taylor*, inter alia, the Michigan Court of Appeals erred in adopting a per se rule that its State's notice-and-hearing requirement violated the Sixth Amendment Compulsory Process Clause in all cases where the State rule may be used to preclude evidence of past sexual conduct between a rape victim and a defendant. In stating that the Sixth Amendment is not so rigid, this Court observed that the notice-and-hearing requirement served legitimate state interests in protecting against surprise, harassment, and undue delay. *Id.* at 152-53. Thus, *Taylor* and *Lucas* hold that a state can constitutionally exclude evidence that may be highly probative of innocence for important policy reasons.

By logical inference from *Taylor* and *Lucas*, a state legislature may surely deem certain evidence to have no

exculpatory weight if, as here, the legislative action does not violate substantive due process principles. Even if the right to defend implicates rights broader than those guaranteed in the Sixth Amendment, it would fly in the face of historical tradition to conclude that it includes a right to defend on the ground of voluntary intoxication. At common law and at the time the Constitution was adopted, voluntary intoxication unquestionably was not considered exculpatory. As discussed in Montana's principal brief, this common law tradition counsels strongly against implication of a substantive due process right to rely upon voluntary intoxication for purposes of negating criminal intent. *E.g., Medina*, 112 S. Ct. at 2577-78 (examining common law tradition with respect to placing burden on defendant to establish lack of mental competence); *Schad*, 501 U.S. at 640-41 (examining common law tradition with respect to commingling premeditated murder and felony murder into single offense); *Patterson*, 432 U.S. at 201-03 (observing that affirmative defense of severe emotional distress under New York law was an expanded version of common law defense of heat of passion on sudden provocation and that at common law defendant had burden of proving such defense).

Tellingly, Respondent makes no mention of the strong common law tradition directly militating against his substantive due process claim of a right to rely on voluntary intoxication to negate the mental state element of deliberate homicide. He asserts, nevertheless, that voluntary intoxication evidence cannot constitutionally be excluded because it is "highly reliable." Resp't Br. at 31. Along the same lines, his amicus argues that modern procedures for precise measurement of a defendant's blood-alcohol level have erased the basis for the common law rule excluding

voluntary intoxication such that the common law rule is an "anachronism." Nat'l Ass'n of Crim. Defense Law. Br. at 24. What the Respondent and his amicus ignore is that it remains impossible to know based on the measurements of the level of blood alcohol when the alcohol was consumed. Thus, it is always possible that a defendant consumed the alcohol after committing the crime and did so with the hope, if not an expectation, that the evidence of intoxication might be a basis for arguing for a lesser offense or for complete exculpation. Surely, the State has a significant interest in deterring such conduct and that interest alone would be sufficient to justify amending § 45-2-203. Respondent's argument about modern procedures also ignores the fact that the common law rule was not based exclusively on a concern that defendants might exaggerate the extent of their intoxication. It also derived from the common law's reluctance to allow one form of inherently dangerous conduct to serve as a basis to negate criminal responsibility where a strong correlation existed between that conduct and the commission of crimes.

But regardless of technological change, it is impossible to square Respondent's argument that substantive due process requires that he be permitted to prove that voluntary intoxication prevented him from acting knowingly and purposely when it is uncontested by Respondent that such an argument would have been categorically rejected by all of the states in 1791 when the Due Process Clause was enacted. This uncontested history makes the due process issue in this case quite narrow. It is unnecessary for the Court to decide whether due process places limits on a state's general ability to declare certain conduct not exculpatory. The Court need only decide that the unique history surrounding the states' treatment of voluntary intoxication

at the time the Constitution was adopted is sufficient to defeat Respondent's substantive due process claim.

In sum, that the Montana legislature has determined that voluntary intoxication is not exculpatory with respect to an offense's mental state requirement distinguishes this case from those decisions upon which Respondent relies to establish a generalized right to present a defense where the asserted "defense" is not recognized under state law as being exculpatory. Accepting his theory would create a right so formless as to know no bounds and mark a radical departure from this Court's settled practice of extreme caution in using substantive due process principles to overturn legislative determinations. *See, e.g., Reno v. Flores*, 113 S. Ct. 1439, 1447 (1993) (" '[s]ubstantive due process' must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field' ").

III. WHETHER ANOTHER CRIME COULD HAVE BEEN CHARGED HERE OR WHETHER THE MAJORITY OF STATES FOLLOW MONTANA'S STATUTORY SCHEME RELATED TO THE VOLUNTARILY INTOXICATED OFFENDER IS IRRELEVANT TO THE CONSTITUTIONAL QUESTION PRESENTED.

Respondent asserts that the Montana Supreme Court's interpretation of federal constitutional law in this case will not dangerously restrict the states' ability to punish crimes committed while intoxicated. He suggests that there are several alternative courses Montana could pursue. For example, he postulates, instead of deliberate homicide, Montana could have properly charged him with negligent homicide or

could have created a strict liability crime entitled "causing death while voluntarily intoxicated." Respondent also notes that the States have power to regulate or prohibit alcohol and intoxicating drugs under the Twenty-first Amendment and under their police powers. He remarks finally that the Montana court's decision comports with the practice of the majority of the states and Montana's practice prior to 1987. Resp't Br. at 33-36. None of these arguments presents a serious basis for challenging Respondent's conviction.[4]

Respondent is incorrect when he states that the principle espoused by the Montana court, i.e., that a defendant has a fundamental constitutional right to present and have the jury consider voluntary intoxication on the issue of intent, comports with the practice of a large majority of states. Resp't Br. at 35. Under the specific/general intent scheme adopted by

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[4] Aside from the fact Respondent did not request at trial that the jury be instructed as to negligent homicide (Tr. 1155-61), the suggestion that he properly could have been charged with negligent homicide under Mont. Code Ann. § 45-5-104 (1995) begs the question. Respondent's argument in this regard apparently derives from his view that the term "negligently," as defined in Mont. Code Ann. § 45-2-101(42) (1995) and used as the mental state in § 45-5-104, imposes a reasonable and sober person standard. Resp't Br. at 35. Nonetheless, distinguishing the definitions of "knowingly" and "purposely" from that of "negligently" on the basis that the former incorporates a "subjective" standard and the latter adopts an "objective" one says nothing about whether giving the intoxication instruction at the trial which did occur violated Respondent's due process rights. Similarly, the fact that the Montana legislature could adopt particular criminal offenses directed at voluntarily intoxicated persons or that States have great latitude under the Twenty-first Amendment with respect to alcohol-related conduct is a truism which, again, has no bearing on the proper outcome here.

some states during the late nineteenth century, and continued by many states to the present day, voluntary intoxication does not operate to relieve a defendant completely from criminal responsibility. Rather, it was and is used as a mitigating factor which would only lead to the defendant's responsibility being lowered to a lesser crime.[5] The vast majority of States still limit the use of voluntary intoxication evidence. To Petitioner's knowledge, only one State, Indiana, is in accord with the Montana Supreme Court's decision mandating that voluntary intoxication evidence be allowed to be considered by the jury as to all crimes. The Indiana court's decision did not rest on federal constitutional grounds. *Terry v. State*, 465 N.E.2d 1085 (Ind. 1984). The remaining States generally either follow the common law rule by not allowing voluntary intoxication to negate intent, allow it to negate specific but not general intent, or allow it only to reduce the degree of murder.

The Constitution does not require that all States follow the same course or that they adopt what the Respondent or even this Court believes is the "best" course. The Court has recognized repeatedly that States have a wide discretion in fashioning methods to prevent and punish crime. A State's policy judgments will not be second-guessed unless those judgments offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked

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[5] Under Section 22 of the Penal Code, enacted in 1895 and remaining unchanged until 1973, a defendant in Montana could not exonerate himself through his voluntary intoxication but could attempt to reduce the degree of the crime. *See State v. Palen*, 178 P.2d 862 (Mont. 1947); *State v. Brooks*, 436 P.2d 91 (Mont. 1967). Therefore, Respondent is mistaken that the Montana court's decision comports with the State's practice from 1895 to 1973.

fundamental. *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *see also Schad*, 501 U.S. at 633; *Patterson*, 432 U.S. at 202. Montana's judgment that voluntary intoxication is not exculpatory with respect to the mens rea element of deliberate murder is a rational choice and Respondent does not argue to the contrary. Accordingly, Montana's law does not violate substantive due process and therefore Respondent's conviction should be affirmed.

CONCLUSION

For the foregoing reasons and those stated in the State's Opening Brief, the judgment of the Montana Supreme Court should be reversed.

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March 1996

No. 95-566

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF MONTANA, PETITIONER

v.

JAMES ALLEN EGELHOFF

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment bars a state from providing that the jury in a criminal case may not consider evidence of the defendant's voluntary intoxication in determining whether he possessed the mental state required for the charged offense.

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INTEREST OF THE UNITED STATES

The Montana Supreme Court concluded that a defendant in a criminal case has a "due process right to present and have considered by the jury all relevant evidence to rebut the State's evidence on all elements of the offense charged." Pet. App. 16a. The Federal Rules of Evidence contain a number of exclusionary provisions whose validity might be subject to challenge if this Court were to endorse such a broad due process right. See Fed. R. Evid. 501 (privilege), 704(b) (expert testimony on defendant's mental state when an element of a crime or defense); 802 (hearsay). In addition, Rule 105 provides that when, as a result of those rules, evidence is admitted

only for a limited purpose "the court * * * shall restrict the evidence to its proper scope and instruct the jury accordingly." The United States therefore has an interest in the proper resolution of this case.

STATEMENT

1. Respondent spent most of July 12, 1992, drinking with two companions, Roberta Pavola and John Christianson. That evening, witnesses saw Christianson's station wagon being driven erratically. Around midnight, officers found the station wagon in a ditch. The bodies of Pavola and Christianson were in the front seat; each had been shot in the head. Respondent was lying in the rear cargo area, yelling obscenities. A handgun belonging to respondent was found in the station wagon; forensics testing identified gunshot residue on respondent's hands. Pet. App. 3a-6a.

2. Respondent was charged with two counts of deliberate homicide. Pet. App. 3a. Under Montana law, to convict a defendant of that offense, the State is required to prove that the defendant "purposely or knowingly cause[d] the death of another human being." Mont. Code Ann. § 45-5-102(1)(a) (1993).

At trial, the government introduced evidence that respondent was capable of purposeful action on the night of the murders. For example, while sitting in the back seat of the moving car, respondent apparently used a stick to depress the accelerator so that he could drive. He made an attempt to flee when the station wagon ran off the road, tried to avoid detection by witnesses who approached the vehicle, and kicked a camera out of the hands of a police officer who was attempting to take his picture. Pet. App. 11a-12a; see *id.* at 5a.

Respondent was allowed to introduce evidence of his intoxication on the night of the murders in order to explain his purported inability to remember the events, and in support of a claim that he lacked the level of physical coordination required to drive Christianson's car or to commit the crimes, thus leading to the inference that "a fourth person was responsible for the shootings." Br. in Opp. 1; Pet. App. 10a. Evidence at trial showed that respondent's blood alcohol level was measured at .36 when he was treated at a hospital shortly after the bodies of Pavola and Christianson were discovered. A doctor who examined respondent at the hospital testified that based on respondent's blood alcohol level and his behavior, it was likely that he had suffered an alcoholic "blackout" around the time of the murders. Respondent testified that he remembered almost nothing of what took place that night. Pet. App. 5a-7a.

The trial court instructed the jury that respondent was presumed innocent, that his plea of not guilty was a denial of "every allegation of the charges against him," and that the State was required to prove his guilt beyond a reasonable doubt—that is, adduce "proof of such a convincing character that a reasonable person would rely and act upon it in the most important of his own affairs." Pet. App. 27a-28a; see also J.A. 13-14. The court also told the jury that it could not consider evidence of respondent's voluntary intoxication in determining whether he acted "purposely or knowingly":

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in

> determining the existence of a mental state which is an element of the offense unless the Defendant proves that he did not know that it was an intoxicating substance when he consumed the substance causing the condition.

Pet. App. 7a-8a.

That instruction was based on a state statute, Mont. Code Ann. § 45-2-203 (1993), which provides:

> **Responsibility—intoxicated condition.** A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, injected, or otherwise ingested the substance causing the condition.

The jury convicted respondent of two counts of deliberate homicide. Pet. App. 3a.

3. The Supreme Court of Montana reversed respondent's convictions, holding that he "was denied due process when the jury was instructed that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense." Pet. App. 16a. While the court noted in passing that *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), recognized a defendant's due process "right to present a defense," Pet. App. 12a, the court relied principally on *Martin* v. *Ohio*, 480 U.S. 228 (1987), where this Court upheld Ohio's rule requiring the defendant to prove self-defense.

The court noted that *Martin* emphasized that the jury in that case was permitted to consider, in determining whether there was reasonable doubt about the State's case, the evidence offered by the defendant in support of a claim of self-defense, and that *Martin* stated that an instruction precluding the jury from considering the self-defense evidence for that purpose would "plainly run afoul" of *In re Winship*, 397 U.S. 358 (1970). Pet. App. 13a (quoting *Martin*, 480 U.S. at 233-234).

In light of that passage from *Martin*, the court concluded that the defendant in a criminal case has "a due process right to present and have considered by the jury all relevant evidence to rebut the State's evidence on all elements of the offense charged." Pet. App. 16a. Precluding the jury from considering relevant evidence, the court believed, lessens the State's burden under *Winship* of proving guilt beyond a reasonable doubt, because a jury that is allowed to consider such evidence could entertain a reasonable doubt as to whether the defendant acted " 'knowingly' and [*sic*, or] 'purposely.' " Pet. App. 14a; see also *id.* at 14a-15a ("The burden * * * is lessened because the defendant is precluded from presenting arguments concerning the prosecution's 'failure of proof' of the subjective mental state element."). The court reasoned that "[b]y allowing the jury to consider such evidence, we permit the jury to make its decision on all of the relevant evidence as required under *Martin*." *Id.* at 14a. Accordingly, the court declared unconstitutional the portion of Mont. Code Ann. § 45-2-203 (1993) that provides that a defendant's intoxicated condition "may not be taken into consideration in determining the existence of a mental state which is an element of the offense." *Ibid.*

SUMMARY OF ARGUMENT

The Montana legislature has made a policy determination that persons who engage in antisocial conduct, including homicide, while voluntarily intoxicated should be held criminally responsible to the same extent as if they had been sober when they committed the criminal acts. Nothing in the *Winship* line of cases, under which the State must prove each element of a criminal charge beyond a reasonable doubt, forecloses that policy choice. To the contrary, those cases make clear that the applicability of the reasonable-doubt standard has always been dependent on how a State defines the offense in the first instance. The State's policy decisions in that regard are subject to due process challenge only if the defendant demonstrates that those decisions "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina* v. *California*, 505 U.S. 437, 445 (1992).

There is no settled tradition that a State may not define its criminal offenses so as to preclude excuses based on any form of diminished capacity, including voluntary intoxication. Under the common law of England, voluntary intoxication afforded no excuse for the crime of murder, even though intoxication might be thought logically "relevant" to one's ability to act with the required element of "malice aforethought." In this country, many States that classified murder into degrees in the mid-nineteenth century departed from the common-law rule and accepted the relevance of intoxication evidence for those murders that required proof of "specific intent." Other States, however, followed the common-law rule on

intoxication even with respect to "specific intent" crimes well into this century.

Moreover, some States precluded defendants from making an analytically indistinguishable claim—*i.e.*, that, as a result of a mental defect not amounting to legal insanity, the defendant could not form the "specific intent" required to commit the crime. In three cases this century, this Court rejected pleas from defendants who claimed that they should have been permitted to rely on that type of diminished capacity to negate the intent element of their murders. In the third of those cases, *Fisher* v. *United States*, 328 U.S. 463 (1946), the Court not only failed to see any due process problem, but also declined to prescribe a different rule under its supervisory authority over the courts of the District of Columbia. In light of that history, respondent cannot sustain his burden of demonstrating that Montana's policy choice violates a deeply rooted tradition of our people.

This Court's decision in *Martin* v. *Ohio*, 480 U.S. 228 (1987), lends no support to the decision below. *Martin* does not create a rule of constitutionally relevant evidence, see *Gilmore* v. *Taylor*, 113 S. Ct. 2112 (1993), and recognition of such a broad due process principle could cast unwarranted doubt on the validity of numerous exclusionary rules of evidence. *Martin* does indicate that *Winship* limits a State's ability to preclude defendants from attempting to create a "reasonable doubt about the State's case." That statement, however, does not aid respondent, because the State's "case" consists of proving only those facts that the legislature has made pertinent to criminal liability. *Martin* therefore cannot fairly be invoked to invalidate the legislature's policy judgment that

intoxication is irrelevant to culpability. That conclusion is not changed in any way by the Montana Supreme Court's observation that the defendant's "purpose" or "knowledge" is an "element" of murder that must be proved beyond a reasonable doubt under *Winship*. The court's observation simply begs the question, because the Montana legislature is free to provide that "purpose" and "knowledge" must be determined without regard to a defendant's voluntary intoxication. Because the Montana Supreme Court's misreading of *Martin* led to the unwarranted invalidation of that policy choice, the judgment of that court should be reversed.

ARGUMENT

DUE PROCESS DOES NOT REQUIRE STATES TO RECOGNIZE VOLUNTARY INTOXICATION OR ANY OTHER FORM OF DIMINISHED CAPACITY AS A BASIS ON WHICH DEFENDANTS MAY AVOID OR LIMIT PUNISHMENT FOR HOMICIDE

1. The Supreme Court of Montana held that federal constitutional law bars the legislature from making the policy judgment to exclude consideration of voluntary intoxication from the mental state that is necessary for the commission of a crime. That analysis is fundamentally mistaken. This Court has made clear that it is for legislatures to prescribe the conditions for criminal punishment for antisocial conduct, see, *e.g.*, *Medina* v. *California*, 505 U.S. 437, 445-446 (1992); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85-86 (1986); *Foucha* v. *Louisiana*, 504 U.S. 71, 94 (1992) (Kennedy, J., dissenting), and that courts therefore "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Medina* v. *California*, 505 U.S. at 445 (quoting *Patterson* v. *New York*, 432 U.S. 197, 201-202 (1977)). As Justice Marshall explained in *Powell* v. *Texas*, 392 U.S. 514, 536 (1968) (plurality opinion), "[t]he doctrines of *actus reus*, *mens rea*, insanity, mistake, justification and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the states." See also *id.* at 545 (Black, J., concurring) ("legislatures have always been allowed wide freedom to determine the extent to which moral culpability should be a prerequisite to conviction of a crime" since it would be "indefensib[le]" to "impos[e] on the States any particular test of criminal responsibility"); *Harmelin* v. *Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in judgment) ("The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation"); *Eaglin* v. *Welborn*, 57 F.3d 496, 502 (7th Cir.) (*en banc*) (state may provide defense of entrapment only to those defendants who admit committing the crime, despite contrary rule in the federal system, since "[t]he Constitution does not require the states to adopt the latest and best thinking on criminal procedure or any other subject"), cert. denied, 116 S. Ct. 421 (1995).

That principle has been applied in a variety of contexts. In *Powell* v. *Texas*, *supra*, the plurality relied on it to reject a challenge to the State's power to criminalize public intoxication, which, because of

the defendant's compulsion to drink, was asserted to constitute "cruel and unusual punishment" barred by the Eighth Amendment. The plurality emphasized that "whatever may be the merits of such a doctrine of criminal responsibility," 392 U.S. at 533, this Court has "never articulated a general constitutional doctrine of *mens rea*." *Id.* at 535. In *McMillan* v. *Pennsylvania*, *supra*, the Court upheld against a due process challenge the State's decision to provide for increased punishment on the basis of a fact that it proved only by a preponderance of the evidence at sentencing, and expressly "reject[ed] the view that anything in the Due Process Clause bars States from making changes in their criminal law that have the effect of making it easier for the prosecution to obtain convictions." 477 U.S. at 89 n.5; accord *Medina* v. *California*, 505 U.S. at 451. And, more recently, in *Schad* v. *Arizona*, 501 U.S. 624 (1991), the Court upheld the power of the State to provide that the defendant could be convicted of murder upon proof of either of two alternative mental states, neither of which required jury unanimity. Speaking for the plurality, Justice Souter explained (*id.* at 638) that "[d]ecisions about what facts are material and what are immaterial, or, in terms of *Winship* * * * what 'fact[s] [are] necessary to constitute the crime,' and therefore must be proved individually, * * * represent value choices more appropriately made in the first instance by a legislature than by a court." See also *id.* at 651-652 (Scalia, J., concurring in judgment).

The Montana statute invalidated by the court below represents an equally valid value choice about what facts are "material" to criminal responsibility and punishment. The Montana legislature has determined that "[a] person who is in an intoxicated condition is criminally responsible for his conduct" and that, accordingly, intoxication "may not be taken into consideration in determining the existence of a mental state" that otherwise is necessary to commit the crime. Mont. Code Ann. § 45-2-203 (1993). The combined effect of Montana's statutes is therefore to require proof of purposeful or knowing conduct, *apart from voluntary intoxication*, as a prerequisite to a conviction for deliberate homicide. It may well be that the mental state that the prosecution is required to prove under state law "is a watered down *mens rea*; however, this is the prerogative of the legislature." *State* v. *Ramos*, 648 P.2d 119, 121 (Ariz. 1982) (upholding statute barring evidence of intoxication on the issue whether the defendant acted "knowingly"); accord *People* v. *DelGuidice*, 606 P.2d 840, 842-844 (Colo. 1979) (same; rejecting *Winship* challenge); see also *State* v. *Souza*, 813 P.2d 1384, 1386 (Hawaii 1991).

Nothing in the Due Process Clause requires a legislature that makes certain forms of intent relevant to criminal culpability also to recognize excuses based on claims of diminished capacity at the time of the offense. A legislature is free to conclude, for example, that a claim of mental abnormality short of insanity does not diminish the moral blameworthiness of the criminal act or bear on the justness of its criminal punishment. Cf. *Bethea* v. *United States*, 365 A.2d 64, 87 (D.C. App. 1976), cert. denied, 433 U.S. 911 (1977).[1] The same is true about the state

[1] As the court noted in *Sollars* v. *State*, 316 P.2d 917, 919 (Nev. 1957), "[t]he existence of mental disorder may well be a fact. * * * It is quite another thing, however, to qualify as

of voluntary intoxication. And, where the substantive law of the State makes such a mental condition irrelevant to the defendant's responsibility, there can be no constitutional error in excluding such evidence when offered for that purpose, or in instructing the jury in accordance with state law.

2. This Court's cases bearing on the due process limits on a State's ability to preclude a defendant's claim that he lacked the mental capacity to commit the offense were thoroughly explored by the Seventh Circuit in *Muench* v. *Israel*, 715 F.2d 1124 (1983) (upholding Wisconsin rule that limits psychiatric evidence to insanity stage of bifurcated trial), cert. denied, 467 U.S. 1228 (1984); see also *Haas* v. *Abrahamson*, 910 F.2d 384, 391-397 (7th Cir. 1990). The Seventh Circuit correctly noted that this Court rejected similar claims in *Fisher* v. *United States*, 328 U.S. 463 (1946), for cases arising in the District of Columbia, as it had earlier rejected them as a rule of due process for the States in *Troche* v. *California*, 280 U.S. 524 (1929) (per curiam), and *Coleman* v. *California*, 317 U.S. 596 (1942) (per curiam). In our view, those cases are inconsistent with the broad due process theory espoused by the Montana Supreme Court in this case.

Troche involved the validity of state statutes providing for a bifurcated trial in murder cases where the defendant asserted the defense of insanity. A trial was first held on the defendant's guilt, at which he was presumed to be sane and all matters of fact tending to establish insanity were inadmissible. The

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factual the determination that a certain state of disorder *ought* to relieve one from responsibility. This is a moral, not a factual, judgment."

sanity issue was determined only after the jury found the defendant guilty. See *People* v. *Troche*, 273 P. 767, 769-770 (Cal. 1928). In holding that the trial judge properly excluded evidence of Troche's mental illness at the first stage of the proceedings, the California Supreme Court relied on the fact that California criminal law did not recognize an excuse from criminal responsibility based on a mental defect other than insanity. *Id.* at 772. Troche appealed to this Court, challenging the statutory presumption of sanity and the exclusion of the insanity evidence at the guilt stage. He contended that those rulings "conclusively presum[ed] one of the main elements of a crime against the defendant, said element being that of intent." 715 F.2d at 1138 (quoting from appellant's brief in this Court). This Court dismissed for want of a substantial federal question. 280 U.S. at 524.[2]

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[2] Such a dismissal is a ruling on the merits of the question that is binding on the lower courts until squarely overruled by this Court. See *Hicks* v. *Miranda*, 422 U.S. 332, 343-345 (1975); cf. *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). See also *Campbell* v. *Wainwright*, 738 F.2d 1573, 1580-1582 (11th Cir. 1984) (upholding exclusion of psychiatric evidence offered to negate specific intent; *Troche* and *Coleman* "are decisions on the merits of this question binding on the circuits courts to the extent that they have not been overruled"), cert. denied, 475 U.S. 1126 (1986); *State* v. *Brom*, 463 N.W.2d 758, 764 (Minn. 1990) (relying on *Troche* and *Coleman* to conclude that "a bifurcated trial procedure in which psychiatric testimony is inadmissible on the issue of premeditation does not violate the federal due process guarantee"), cert. denied, 499 U.S. 940 (1991). That dismissal is also entitled to precedential weight in this Court, though not "to the same deference given a ruling after briefing, argument, and a written opinion." *Caban*

Coleman also involved a challenge to the California scheme for proving insanity. The defendant in *Coleman* challenged his conviction on the ground that the jury should be permitted to consider "mental abnormalities not amounting to a complete defense of legal insanity, but which still may show the lack of capacity to form the specific intent to commit first degree murder." *People* v. *Coleman*, 126 P.2d 349, 353 (1942). The California Supreme Court rejected that claim, noting that such a view was more properly addressed "to the desirability of the legislative policy, rather than to the question of deprivation of constitutional rights under the established system." *Id.* at 353. Citing its prior summary disposition in *Troche*, this Court dismissed Coleman's ensuing appeal. *Coleman*, 317 U.S. at 596.

Shortly thereafter, this Court reached the same conclusion, after briefing and argument, in a murder case prosecuted by the United States in the local courts of the District of Columbia. See *Fisher* v. *United States*, 328 U.S. 463 (1946). After a unitary trial, the defendant in *Fisher* was convicted and sentenced to death for first degree murder, an offense for which "[d]eliberation and premeditation [were] necessary elements." *Id.* at 464-465. At his trial, he was permitted to introduce testimony of his mental infirmities in support of an insanity defense, but the trial court refused to instruct the jury that such evidence should be considered in deciding whether the

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v. *Mohammed*, 441 U.S. 380, 390 n.9 (1979). As we explain below, *Fisher* rejected similar claims after briefing and argument.

killing was deliberate and premeditated.[3] This Court agreed with Fisher's submissions that the jury "could have determined from the evidence [of his mental deficiency] that the homicide was not the result of premeditation and deliberation," *id.* at 467, and that "[t]he jury might not have reached the result it did if the theory of partial responsibility for his acts which the petitioner urges had been submitted." *Id.* at 470.[4] The Court nonetheless affirmed, emphasizing

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[3] The instruction requested by the defendant provided: "The jury is instructed that in considering the question of intent or lack of intent to kill on the part of the defendant, the question of premeditation or no premeditation, deliberation or no deliberation, whether or not the defendant at the time of the fatal acts was of sound memory and discretion, it should consider the entire personality of the defendant, his mental, nervous, emotional and physical characteristics as developed by the evidence in the case." *Fisher* v. *United States*, 149 F.2d 28, 29 (D.C. Cir. 1945), aff'd, 328 U.S. 463 (1946).

[4] That recognition indicates that the Court's affirmance was not based on the view that the defendant's theory of defense was adequately covered by the balance of the trial court's instructions, compare *United States* v. *Pomponio*, 429 U.S. 10, 12-13 (1976) (per curiam), but on the view that the applicable substantive law, which did not recognize the defendant's theory of excuse, would have made the giving of the proposed instruction error. See also *Fisher*, 328 U.S. at 491 (Murphy, J., dissenting) ("The issue here is narrow yet replete with significance. Stated briefly, it is this: May mental deficiency not amounting to complete insanity properly be considered by the jury in determining whether a homicide has been committed with the deliberation and premeditation necessary to constitute first degree murder?"); *Muench* v. *Israel*, 715 F.2d at 1142 ("Under *Fisher*, it seems inescapable that it would have been proper to instruct the jury that the evidence it did in fact hear concerning the defendant's mental

(*id.* at 476) that recognition of any doctrine excusing criminal acts on the ground of "partial responsibility" would be "a radical departure from common law concepts * * * [and] more properly a subject for the exercise of legislative power or at least for the discretion of the courts of the District." As the Court noted:

> [T]here was sufficient evidence to support a verdict of murder in the first degree, if petitioner was a normal man in his mental and emotional characteristics. But the defense takes the position that the petitioner is fairly entitled to be judged as to deliberation and premeditation, not by a theoretical normality but by his own personal traits. In view of the status of the defense of partial responsibility in the District and the nation no contention is or could be made of the denial of due process.

328 U.S. at 466 (citation omitted). Indeed, the Court did not even find it appropriate to exercise its supervisory power to require the instruction sought by the defendant. *Id.* at 476-477.[5]

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illness could not be considered by it in reaching its verdict on the *mens rea* question, but only in its deliberation on the insanity question."); *Welcome* v. *Blackburn*, 793 F.2d 672, 674 (5th Cir. 1986) (upholding, as "a proper statement of Louisiana law" which is "permissible as a matter of federal constitutional law" under *Fisher*, an instruction telling the jury that "any mental disability short of legal insanity * * * cannot serve to negate specific intent and reduce the degree of the crime"), cert. denied, 481 U.S. 1042 (1987).

[5] A similar issue has arisen in the lower courts under the Insanity Reform Act of 1984, 18 U.S.C. 17, which not only restricted the defense of insanity, but also provided that "[m]ental disease or defect does not otherwise constitute a defense." *Ibid.* Several courts of appeals have concluded that, in enacting that Act, Congress did not intend to preclude claims of mental defect (short of insanity) when the purported mental abnormalities would negate the intent element of a crime. See, *e.g.*, *United States* v. *Pohlot*, 827 F.2d 889, 900-903 (3d Cir. 1987), cert. denied, 484 U.S. 1011 (1988); see also *id.* at 902 n.12. In our view, if Congress concludes that those courts have misread its intent on that question, it clearly would have the constitutional authority to preclude admission of such evidence on the issue of *mens rea*.

Significantly for this case, the defendant in *Fisher* relied on this Court's earlier decision in *Hopt* v. *People*, 104 U.S. 631 (1881), in which this Court had "reversed the Supreme Court of the Territory of Utah for failure to give a partial responsibility charge upon evidence of drunkenness." 328 U.S. at 475.[6] The *Fisher* Court did not disagree that, insofar as Fisher's and Hopt's crimes each required proof of deliberation and premeditation, the issues were analytically identical. See 328 U.S. at 491-493 (Murphy, J., dissenting) (arguing that *Hopt* controlled, and that the lower courts were under a "duty * * * to fashion rules to permit the jury to utilize all relevant evidence directed toward" the existence of deliberation and premeditation).[7] The Court distinguished

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[6] Respondent also relied on *Hopt* in opposing the State's petition for a writ of certiorari. See Br. In Opp. 8-9.

[7] See also *Robinson* v. *Ponte*, 933 F.2d 101, 104-105 (1st Cir. 1991) (noting the First Circuit's reluctance to hold that "federal constitutional law *compels* an instruction, where warranted by the evidence, that evidence of intoxication may be considered in deciding whether the prosecution has proved specific intent beyond a reasonable doubt," and citing, *inter alia*, *Fisher*), cert. denied, 503 U.S. 922 (1992). Indeed, Fisher argued that his claim was far more compelling than Hopt's:

Hopt, however, on the ground that "the Territory of Utah had a statute specifically establishing such a rule." 328 U.S. at 475; see also *id.* at 473 n.11 ("The Court was there considering intoxication under a statutory requirement that the intoxication should be taken into consideration by the jury in determining the degree of the offense."). Neither Congress nor the local courts of the District of Columbia, to which "[m]atters relating to law enforcement in the District [were] entrusted," had made an analogous policy choice with respect to Fisher's theory of reduced responsibility resulting from mental deficiency. *Id.* at 476.[8]

"If intoxication voluntarily induced and carried to such a degree that the accused is incapable of deliberating can reduce the crime from murder in the first degree to murder in the second degree, it certainly would appear that disease and congenital defects which the accused can neither prevent nor cure should have under similar circumstances no less effect." Petition for a Writ of Certiorari at 14, *Fisher* v. *United States*, 328 U.S. 463 (1946) (No. 122).

[8] That the Court regarded the issue as one of policy is underscored by its response to Fisher's observation that "evidence of intoxication to a state where one guilty of the crime of murder may not be capable of deliberate premeditation requires in the District of Columbia an instruction to that effect." *Fisher*, 328 U.S. at 473-475. Fisher argued that it necessarily followed that mental deficiency evidence warranted a similar instruction. While not disputing Fisher's suggestion that mental deficiency evidence was logically just as relevant as intoxication evidence, *id.* at 475, the Court determined that whether the jury should be instructed to consider mental deficiency evidence was not a matter of due process, *id.* at 466, but was a matter "more properly a subject for the exercise of legislative power or at least for the discretion of the courts of the District." *Id.* at 476; see also *Griffin* v. *United States*, 336 U.S. 704, 717 (1949) ("The conviction in [*Fisher*] was affirmed essentially on the principle that the law of evidence and procedure governing criminal trials in the District of Columbia is in the keeping of the Court of Appeals for the District and is not to be exercised by this Court").

The teaching of *Troche*, *Coleman*, and *Fisher* is that the substantive judgments about what sorts of mental characteristics—particularly claims of diminished capacity—will be deemed legally significant to excuse an individual's responsibility for criminal conduct are to be made by lawmaking bodies, not by application of the Due Process Clause. Within broad limits set by other constitutional guarantees, such as any proportionality inquiry required under the circumstances by the Eighth Amendment, cf. *Harmelin* v. *Michigan*, *supra*, it is within the competence of legislative powers to punish crimes based on proof of a mental state that assumes a defendant's "theoretical normality [apart from] his own personal traits." *Fisher*, 328 U.S. at 466. Because that is precisely the effect of the Montana statute that makes intoxication irrelevant to a defendant's *mens rea*, the court below erred in invalidating it.

3. Nothing in *In re Winship*, 397 U.S. 358 (1970), or its progeny, requires a different conclusion. *Winship* accorded substantive due process protection to the longstanding common law rule that prohibited a defendant's conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364; see also *Miles* v. *United States*, 103 U.S. 304, 312 (1881). That was far from a radical development, since "[l]ong before *Winship*, the universal rule in this country was that the prosecution must prove

guilt beyond a reasonable doubt." *Patterson* v. *New York*, 432 U.S. at 211; see also *Winship*, 397 U.S. at 361 (noting "virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions").[9] And, as subsequent decisions have made clear, *Winship* did not alter the antecedent understanding that the proof that is sufficient for conviction "must be gauged in light of the applicable [state] law." *Jackson* v. *Virginia*, 443 U.S. 307, 324 (1979); *Patterson* v. *New York*, 432 U.S. at 211 n.12 ("The applicability of the reasonable-doubt standard * * * has always been dependent on how a State defines the offense that is charged in any given case"). A State's decisions in this regard are not subject to due process challenge unless they " 'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Medina* v. *California*, 505 U.S. at 445 (quoting *Patterson* v. *New York*, 432 U.S. at 201-202).

Here, there is "no historical basis for concluding" (*Medina* v. *California*, 505 U.S. at 448) that there is "a settled tradition" (*id.* at 446) that prevents a State from defining its criminal offenses so as to preclude excuses based on any form of diminished

[9] Thus, where the reasonable-doubt right was recognized as applicable, failure of the State to respect it would amount to a due process violation, even before *Winship*. See 397 U.S. at 386 (Black, J., dissenting) ("as long as a particular jurisdiction requires proof beyond a reasonable doubt, then the Due Process Clause commands that every trial in the jurisdiction must adhere to that standard"); cf. *Walker* v. *Sauvinet*, 92 U.S. 90, 93 (1876). *Winship* arose only because the state law at issue did not extend the same right to juvenile adjudications. 397 U.S. at 360.

capacity, including voluntary intoxication. As the Court noted in *Hopt* v. *People*, *supra*, "[a]t common law, indeed, as a general rule, voluntary intoxication afford[ed] no excuse, justification, or extenuation of a crime committed under its influence." 104 U.S. at 633; see also Jerome Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045, 1046 (1944) ("The early common law apparently made no concession whatever because of intoxication, however gross"); *Colbath* v. *State*, 4 Tex. Crim. 76, 77-79 (1878).[10] It was not until the mid-nineteenth century that some States began relaxing that rule, but even then only with respect to statutory crimes requiring "specific intent" for their commission. See Hall, 57 Harv. L. Rev. at 1049-1050.[11] Some States,

[10] As the court noted in *Colbath*, "[w]e find it laid down as early as the reign of Edward VI. (1548), that 'if a person that is drunk kills another, this shall be a felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but, inasmuch as that ignorance was occasioned by his own act and folly, he might have avoided it, he shall not be privileged thereby.' Plowd. 19." 4 Tex. Crim. at 77-78; see also *id.* at 78 (noting Hale's view that "such a person shall have no privilege by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses") (quoting 1 Matthew Hale, *History of the Pleas of the Crown* 32); 4 William Blackstone, *Commentaries* *26 ("The law of England, considering how easy it is to contract this excuse, and how weak an excuse it is (though real), will not suffer any man thus to privilege one crime by another.").

[11] The Model Penal Code recognizes intoxication as an excuse when it "negatives an element of the offense" other than recklessness. See Model Penal Code § 2.08(1) (1985). As the drafters recognized, the Code's distinction turns purely on policy choices since "[as] a matter of logic the fact of acute

however, retained the common law rule even with respect to "specific intent" offenses well into this century. See *State* v. *Shipman*, 189 S.W.2d 273, 274-275 (Mo. 1945); *State* v. *Stacy*, 160 A. 257, 268-269 (Vt. 1932).

Indeed, as demonstrated by *Troche*, *Coleman*, and *Fisher*, there was no widely-shared understanding—late into this century—that a defendant's purported lack of mental capacity to form a "specific intent" to commit murder inherently precluded his criminal responsibility, even with respect to the far more sympathetic cases posed by defendants whose asserted lack of capacity stemmed from mental abnormality rather than from their own voluntary conduct. The defendant in *Fisher* specifically urged that his proposed rule followed from Congress's decision to depart from the common law by recognizing degrees of murder. 328 U.S. at 472-473. In rejecting that claim, the Court noted that common-law murder required "malice aforethought, either express or implied," and explained that "[a]s capacity of a defendant to have malice would depend upon the same kind of evidence and instruction which is urged here, it cannot properly be said that the separation of murder into degrees introduced a new situation into the law * * *." *Id.* at 473 (footnotes omitted).[12]

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alcoholic intoxication may ground an inference that the actor did not act with the knowledge or purpose *or recklessness* required as an element of the crime." *Id.* at 352 n.7 (emphasis added).

[12] Whether or not "most of the modern [state] criminal codes provide either that intoxication is a defense if it negatives a mental state or that it is admissible in evidence whenever relevant to negate an element of the offense charged,"

The Montana Supreme Court erred in reading this Court's decision in *Martin* v. *Ohio*, *supra*, as requiring a different conclusion. *Martin* did state that it would be error under *Winship* to instruct the jury "that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case." 480 U.S. at 233; see also *Leland* v. *Oregon*, 343 U.S. 790, 794-795 (1952). That statement, however, has meaning only with reference to what "the State's case" *is*. It therefore cannot be divorced from the settled rule that "[t]he applicability of the reasonable-doubt standard * * * has always been dependent on how a State defines the offense that is charged in any given case." *Patterson* v. *New York*, 432 U.S. at 211 n.12; *McMillan* v. *Pennsylvania*, 477 U.S. at 85.[13] *Martin*'s obser-

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see 1 Wayne R. LaFave & Austin W. Scott, *Substantive Criminal Law* § 410(a), at 551 n.8 (1986), the issue remains one of legislative policy. There is no uniform rule in this country that evidence of voluntary intoxication must always be admitted, see 95-566 Amicus Br. of Delaware *et al.* at 4 n.1 (filed Nov. 6, 1995) (listing ten States with provisions comparable to Montana's), or that *all* purported "diminished capacity" evidence must be admitted. See also *Martin* v. *Ohio*, 480 U.S. at 236 (that all but two States had abandoned common law rule of requiring the defendant to prove self-defense did not render the rule of those two States unconstitutional).

[13] Indeed, the statement that followed the one we quote in the text indicates that the Court was concerned about an entirely different problem: "*i.e.*, [an instruction] that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard." 480 U.S. at 233-234. That type of "discrimination" against defense evidence has long been held to burden the reasonable-doubt standard, and therefore to violate *Winship*. See *Cool* v. *United States*, 409 U.S. 100, 102-104 (1972) (instruction directing jury to con-

vation was correct so far as it went, but only because it was not disputed in that case that Ohio law defined the intent element of murder in a way that made the "self-defense evidence" relevant to whether the State had proved that element beyond a reasonable doubt. Compare *Jackson* v. *Virginia*, *supra*, where the Court considered evidence of the defendant's intoxication in determining whether he acted with premeditation (443 U.S. at 325), but only after carefully noting that "[u]nder Virginia law, voluntary intoxication * * * is material to the element of premeditation and may be found to have negated it." *Id.* at 311 n.12.

It is true, as the Montana Supreme Court observed, that *mens rea*—*i.e.*, "purpose" or "knowledge"—is an "element" of the crime with which respondent was charged and that this mental element must therefore be proved beyond a reasonable doubt under *Winship*. See also *Sandstrom* v. *Montana*, 442 U.S. 510, 520-521 n.10 (1979). But that observation simply begs the question, because the Montana legislature is free to define what "purpose" and "knowledge" *mean* by regulating the factors that bear on proof of a "mental state which is an element of the offense." Mont. Code Ann. § 45-2-203. See, *e.g.*, *McMillan* v. *Pennsylvania*, 477 U.S. at 85; see also *Staples* v. *United States*, 114 S. Ct. 1793, 1796 (1994); *United States* v. *Gaudin*, 115 S. Ct. 2310, 2321 (1995) (Rehnquist, C.J., concurring). *Winship* requires the prosecutor to prove the elements of the crime as those elements have been defined by the entire corpus of state law, cf. *Martin*, 480 U.S. at 235; *Engle* v. *Isaac*, 456 U.S. 107, 120-121 (1982),

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sider testimony of defense witness only if satisfied of its truth beyond a reasonable doubt).

including all relevant statutes passed by the state legislature. *Winship* does not require that courts assume the quite different task that the Montana Supreme Court undertook here—*viz.*, to invalidate a statute that makes a particular mental condition irrelevant to a defendant's responsibility, without even considering that the state legislature is free to make policy choices in the definition of crimes by refining the state of mind required for conviction. As an interpretation of *Winship* and its progeny, the analysis of the court below amounts to putting the cart before the proverbial horse.

The circularity of the Montana Supreme Court's reasoning is well illustrated by its conclusion that *Martin* and *Winship* require "the jury to make its decision on all of the relevant evidence." Pet. App. 14a. Relevance is not ordinarily understood as "an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in a case." *Huddleston* v. *United States*, 485 U.S. 681, 689 (1988) (quoting Advisory Committee's Notes on Fed. R. Evid. 401). Because the matters "properly provable" in a state criminal case traditionally have been thought to be in the province of the legislature, it is anomalous to invoke the criterion of "relevance" to invalidate a state statute that purports to provide that some matters are *not* "properly provable" in a case.

Moreover, apart from begging the question of what matters were properly provable to establish respondent's crime, there is no support in this Court's cases for the proposition that due process requires admission of "all relevant evidence" (Pet. App. 14a, 16a)

that theoretically could create a reasonable doubt about the State's case. If accepted, such a broad view of a defendant's due process rights could effectively preclude application in criminal cases of many exclusionary rules of evidence the validity of which has never before been doubted.[14] *Winship*, however, did not establish any doctrine of "constitutionally relevant evidence." *Gilmore* v. *Taylor*, 113 S. Ct. 2112, 2118-2119 (1993); accord *Michigan* v. *Lucas*, 500 U.S. 145, 149 (1991) (the fact that state evidentiary rules "operate[] to prevent a criminal defendant from presenting relevant evidence * * * does not necessarily render [them] unconstitutional" under the Sixth Amendment).[15]

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[14] Under the broad due process principle articulated by the Montana Supreme Court, a criminal defendant could claim an absolute right to impeach government witnesses with ancient convictions, see Fed. R. Evid. 609, to introduce logically relevant expert testimony that is insufficiently reliable to amount to "scientific knowledge," see Fed. R. Evid. 702; *Daubert* v. *Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 2795 (1993), or to introduce evidence of his co-defendant's "other wrongs" to demonstrate that co-defendant's "propensity" to commit crimes and thus the likelihood that he, rather than the defendant, was the guilty party, see Fed. R. Evid. 404(b).

[15] That is not to say, of course, that there are no due process limits to the State's ability to exclude evidence from a criminal case. The Due Process Clause "guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California* v. *Trombetta*, 467 U.S. 479, 485 (1984)); see *Rock* v. *Arkansas*, 483 U.S. 44, 55-56 (1987); *Chambers* v. *Mississippi*, 410 U.S. 284, 294 (1973); see also *Jackson* v. *Virginia*, 443 U.S. at 314-315 (distinguishing *Winship* right from the due process right of "a meaningful opportunity to defend"). In our view, that separate due process right is not at issue here, because its existence necessarily turns on a recognition by the law that defines the crime that the claim being advanced by the defendant would provide grounds for an acquittal.

CONCLUSION

The judgment of the Supreme Court of Montana should be reversed.

Respectfully submitted.

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No. 95-556

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

vs.

JAMES ALLEN EGELHOFF,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF OF THE STATES OF HAWAII, ALASKA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, KANSAS, OHIO, OKLAHOMA, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW MEXICO, PENNSYLVANIA, SOUTH CAROLINA, TEXAS, AND WEST VIRGINIA, THE TERRITORY OF AMERICAN SAMOA, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is a defendant deprived of his right to due process under the Fourteenth Amendment to the United States Constitution when a jury is instructed, pursuant to a state statute, that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense?

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INTERESTS OF THE AMICI CURIAE

Within their respective jurisdictions, the amici States administer criminal justice systems intended to promote the safety and welfare of their citizenry. These criminal justice systems are fundamentally threatened by the rule of law adopted by the Supreme Court of Montana, namely, that the federal Constitution prohibits a State from making evidence of voluntary intoxication substantively irrelevant to whether a criminal defendant possesses the state of mind required to commit a particular crime.

Many of the amici States have laws very similar to Montana's ban on the introduction of proof of voluntary intoxication for purposes of disproving the presence of a required mental state. Many additional States have enacted so-called "rape-shield" laws that prohibit the introduction of evidence of a rape victim's past sexual conduct when consent is an issue. Such rape-shield laws embody substantive values in a manner structurally similar to the Montana statute that is at issue in this particular case.

All of the amici States share the concern that the federal constitutional analysis adopted by the Montana Supreme Court, if adopted by this Court, would in unprecedented fashion limit the States' – as well as the federal Government's – fundamental interest in defining, substantively, what constitutes a crime within their respective jurisdictions. For these reasons, the amici States urge this Court to reverse the judgment below.

STATEMENT OF THE CASE

1. The Montana legislature, as have other State legislatures,[1] has eliminated voluntary intoxication as a defense to criminal conduct and has made evidence of voluntary intoxication irrelevant for purposes of establishing the defendant's mental state. Section 45-2-203 of Montana Code Annotated, as amended in 1987, provides in relevant part:

> *Responsibility – intoxicated condition.* A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition.

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[1] *See State v. Ramos*, 648 P.2d 119 (Ariz. 1982) (Ariz. Rev. Stat. Ann. § 13-503 (1980); *see also id.* § 13-503 (1993); *White v. State*, 717 S.W.2d 784 (Ark. 1986) (Ark. Code Ann. § 5-2-207 (Repl. 1993)); *see also Pharo v. State*, 783 S.W.2d 64 (Ark. Ct. App. 1990); *Wyant v. State*, 519 A.2d 649 (Del. 1986) (Del. Code Ann. tit. 11, § 421 (Repl. 1987)); *Foster v. State*, 374 S.E.2d 188, 194-95 (Ga. 1988), *cert. denied*, 490 U.S. 1085 (1989) (Ga. Code Ann. § 16-3-4 (1968)); *State v. Souza*, 813 P.2d 1384 (Haw. 1991) (Haw. Rev. Stat. § 702-230 (1986)); *see also* Haw. Rev. Stat. § 702-230 (1993); *Lanier v. State*, 533 So. 2d 473 (Miss. 1988); *State v. Erwin*, 848 S.W.2d 476 (Mo. 1993), *cert. denied*, 114 S. Ct. 88 (1994) (Mo. Rev. Stat. § 562.076 (1983)); *Commonwealth v. Rumsey*, 454 A.2d 1121 (Pa. Super. 1983) (18 Pa. Cons. Stat. Ann. tit. 18, § 308 (Purdon 1976)); *State v. Vaughn*, 232 S.E.2d 328 (S.C. 1977); *Hawkins v. State*, 605 S.W.2d 586 (Tex. Crim. App. 1980) (Tex. Penal Code Ann. § 8.04 (Vernon 1974)).

2. On July 12, 1992, near Troy, Montana, Roberta Pavola and John Christianson were killed in the front seat of the station wagon belonging to Christianson. *State v. Egelhoff*, 900 P.2d 260, 261 (Mont. 1995). Respondent James Allen Egelhoff was found in the rear cargo area, alive but intoxicated. *Id.* At his subsequent trial for deliberate homicide under Montana law, the prosecution introduced a variety of evidence linking Egelhoff to the crimes. The State proved that Egelhoff, at the time of the murders, had no transportation, and no personal effects other than some clothing and a .38 caliber handgun which he kept in a holster on his right hip. *Id.* Sometime in early July, Egelhoff and a friend became acquainted with Christianson and Pavola, after meeting them at a campsite in the Yaak area, where all four had gone to pick mushrooms. *Id.* On Sunday, July 12, 1992, Egelhoff, Pavola, and Christianson sold their mushrooms and bought beer, after which they went to an apartment in Troy. They spent the rest of the day and evening drinking at the party and at various bars, leaving sometime after 9:00 p.m. in Christianson's station wagon. *Id.* at 261-62. Christianson drove; Pavola sat in the passenger seat; Egelhoff sat in the rear. *Id.* at 262.

3. The State at trial proved that Egelhoff and Christianson were at an IGA grocery store at about 9:20 p.m. *Id.* According to witnesses, Egelhoff at this time spoke well and did not slur his words. *Id.* at 265. A short while later, the station wagon was seen being driven in an erratic manner on Highway 2, west of Troy. *Id.* at 262. Just before midnight, two witnesses who had seen the station wagon reported the driver to the Lincoln County Sheriff's department. *Id.* A short period after the witnesses

observed the driver's erratic driving, the car had veered off of the road and into a ditch. *Id.* Pavola had been shot in the left temple; Christianson had been shot in the right back side of his head. *Id.* Pavola's body was found in the passenger seat; Christianson's was found in the middle of the front seat close to Pavola, with his legs on the floorboards in front of the passenger's seat. *Id.* Egelhoff's gun, with two spent casings, was found near the brake pedal. *Id.* Also found near the brake pedal was a stick that could have been used by Egelhoff to depress the accelerator from the rear seat. *Id.* at 265. Egelhoff was found in the back of the station wagon, where the back seat had been laid flat. *Id.* at 262. Pamela Garrison, one of the first witnesses to approach the car, testified that Egelhoff tried to avoid detection. *Id.* at 265. Egelhoff told Garrison to "stay away," and attempted to flee the scene. *Id.* Egelhoff was taken to an area hospital at about 1:00 a.m., in an intoxicated, combative, mood. *Id.* at 262. At least two officers were required to restrain him. *Id.* Egelhoff showed good coordination, and even kicked a camera out of the hands of a detective who was seeking to take his picture. *Id.* Officers on the scene testified they were surprised to learn that Egelhoff's blood alcohol content was .36 percent. *Id.* Witnesses at the scene testified that Egelhoff kept asking questions in the nature of, " 'Did you find him?' " *Id.* at 263. Egelhoff's theory at trial was that there was a fourth person in the car who had disappeared before officers arrived at the accident scene. *Id.* Egelhoff contended at his trial that his level of intoxication precluded him from having driven the car or undertaken the physical tasks necessary to kill Pavola and Christianson. *Id.*

4. Egelhoff was convicted of two counts of deliberate homicide in the state District Court of Montana. *Id.* Pursuant to § 45-2-203, the trial court gave the following instruction:

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the Defendant proves that he did not know that it was an intoxicating substance when he consumed the substance causing the condition.

900 P.2d at 263. The Supreme Court of Montana reversed, concluding that the instruction, based on section 45-2-203, Montana Code Annotated, deprived Egelhoff of procedural Due Process. *Id.* at 265. The Court reasoned that, because the Montana crime of deliberate homicide required the state to prove "that the defendant acted 'knowingly' or 'purposely' in causing the death of another human being," *id.* at 263, the Montana statute ran afoul of the principles of *In Re Winship*, 397 U.S. 358 (1970), which requires a State to prove every element of a crime beyond a reasonable doubt, and *Sandstrom v. Montana*, 442 U.S. 510 (1979), which struck down jury instructions that had shifted the burden of proof generally on matters of intent by directing the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." The Montana Supreme Court also relied on this Court's decisions in *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Martin v. Ohio*, 480 U.S. 228 (1987), which concerned, respectively, an alibi defense, and an assertion of the Ohio's defense of self-

defense. 900 P.2d at 264-65. The Montana Supreme Court recognized, however, that its ruling embodied a "new rule" of federal law, and thus would not apply to convictions that had survived direct review. *Id.* at 266.

ARGUMENT

Montana's Statutory Decision Substantively to Make Voluntary Intoxication Irrelevant to the Mental Element of Deliberate Homicide Does Not Violate Due Process; To Hold Otherwise Would Nullify, in a Way Unprecedented in this Court's Decisions, the States' Powers to Define Crime.

A. Introduction.

Montana's decision to prohibit a criminal defendant from pointing to evidence of voluntary intoxication as a basis for overcoming the prosecution's proof of purposeful action is a valid exercise of the States' power to define criminal conduct.

At the outset, it is important briefly to summarize what this case is not about. Respondent, for example, does not challenge his eighty-year sentence as "cruel or unusual."[2] Nor does Egelhoff claim he was not on notice

[2] *See Harmelin v. Michigan*, 501 U.S. 957, 994-996 (1991); *id.* at 996-1009 (Kennedy, J., joined by O'Connor, and Souter, JJ.). Such a challenge was never perfected in the Montana courts, and was not preserved as a ground to sustain the appellate judgment below. Had it been so perfected, *Harmelin* would cover the issue.

of the 1987 amendment to Montana law.[3] Nor is there any claim here that Respondent was physically addicted to alcohol.[4] Similarly, this case does not involve the perhaps more difficult issues that would arise if a State sought to abolish the affirmative defense of self-defense to a charge of deliberate homicide.[5] Finally, this case is also not one where a State has refused to permit proof of intoxication to negate the conclusion that a defendant inflicted fatal blows.[6]

[3] *See California Department of Corrections v. Morales*, 115 S. Ct. 1597, 1601 (1995) (quoting *Collins v. Youngblood*, 497 U.S. 37, 43 (1995)).

[4] *See Powell v. Texas*, 392 U.S. 514 (1968). Indeed, nothing in the Montana statute would prohibit Egelhoff from raising involuntary intoxication in connection with the mental state issue.

[5] *See Rowe v. DeBruyn*, 17 F.3d 1047 (7th Cir.), *cert. denied*, 115 S. Ct. 508 (1994); *White v. Arn*, 788 F.2d 338 (6th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987). *But cf. Griffin v. Martin*, 785 F.2d 1172, 1187 n.37 (4th Cir.), *aff'd & op. withdrawn*, 785 F.2d 22 (1986) (en banc), *cert. denied*, 480 U.S. 919 (1987) (stating, in dictum, that "[i]t is difficult to the point of impossibility to imagine a right in any state to abolish self defense altogether, thereby leaving one a Hobson's choice of almost certain death through violent attack now or statutorily mandated death through trial and conviction of murder later"); *Isaac v. Engle*, 646 F.2d 1129 (6th Cir. 1980) (en banc) (Merritt, J., dissenting on other grounds), *rev'd*, 456 U.S. 107 (1982) ("I believe that the Constitution prohibits a state from eliminating the justification of self defense from its criminal law . . . ").

[6] *See Chambers v. Mississippi*, 410 U.S. 284 (1973). The jury instruction that was found invalid by the state court fully permitted Egelhoff to argue that he simply was not the one who pulled the trigger, because he could not have been sober enough to do so. Nor did the instructions nor any rulings on evidence bar Egelhoff from adducing his own proof of intoxication for purposes of the alibi issue, or from pointing to the proof of

Rather, this case concerns the intersection of two rules of constitutional law: (1) the principle that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," *In re Winship*, 397 U.S. 358, 364 (1970); and (2) the corollary that, in this context, "due process guarantees are dependent upon the law as defined by the legislative branches." *Patterson v. New York*, 432 U.S. 197, 211 n.12 (1977). In this instance, the Montana Supreme Court wrongly undervalued the second rule, and therefore wrongly deployed the federal Constitution to invade the legislature's prerogative to define crime. In particular, the Montana Supreme Court incorrectly interpreted *Winship* and its progeny (*e.g.*, *Sandstrom v. Montana*, 442 U.S. 510 (1979)), as disabling the legislative branch from restricting the definition of the mental state elements of deliberate homicide ("knowingly" or "purposely") by the 1987 amendments governing proof of voluntary intoxication. Those amendments, by making voluntary intoxication substantively irrelevant to the mental state element in any deliberate homicide prosecution, simply establish Montana's strong policy against the irresponsible consumption of alcohol and other intoxicants, and should be upheld by this Court under the flexible approach to Due Process reflected in *Patterson v. New York*, 432 U.S. 197 (1977).

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intoxication otherwise in the record to support his alibi defense. Nor did the invalidated instructions relieve the State of the duty to prove beyond a reasonable doubt that Egelhoff in fact pulled the trigger, killing two innocent individuals.

B. This Court's Decisions Grant the States and the Federal Government Broad Discretion to Define the Mental State Elements of Serious Crimes; Such A Redefinition is All is at Issue in this Case.

This Court's decision in *In re Winship*, 397 U.S. 358 (1970), and its progeny, leaves intact the States' broad discretion to define crime. In this case, Montana has done nothing more than exercise this discretion by making voluntary intoxication a fact that cannot be used to negate proof that a defendant acted "knowingly" or "purposely." Montana was not constitutionally required to treat a homicide committed under the influence of voluntary intoxication as lawful, or as punishable as a lesser included offense. Accordingly, the judgment of the state supreme court should be reversed, and remanded for further proceedings.

The most critical error in the Montana Supreme Court's analysis is the state court's failure to appreciate the narrow limits of *Winship* and its progeny. *Winship*, to be sure, held that Due Process prohibits convicting a defendant "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," *id.* at 364, but that holding arose in the context of a statutory scheme in which the State refused to prove anything "beyond a reasonable doubt." Because New York had allowed conviction of juveniles on a mere preponderance of the evidence, *Winship* did not define the limits of the States' sovereign power actually to define criminal acts.

Winship was followed by *Mullaney v. Wilbur*, 421 U.S. 684 (1975), which held that, because Maine generally required the State to prove "Malice aforethought" as an element of the offense of murder, it could not shift to the defense the burden of proving, even by a preponderance of the evidence, that a homicide was not murder, but manslaughter, because the defendant acted out of the "heat of passion on sudden provocation." *Id.* at 704.

Although *Mullaney's* rationale could have been expanded to require a State to disprove any defense beyond a reasonable doubt, it (1) did not affect the ability of the States to define criminal behavior in the first instance, and (2) has been significantly limited in its reach by other decisions of this Court.

These two conclusions are perhaps best demonstrated by *United States v. Park*, 421 U.S. 658 (1975), decided the same day as *Mullaney*. There, the Court upheld a criminal conviction under the Food, Drug, and Cosmetic Act, which did not require proof of "consciousness of wrongdoing," so long as the Government proved beyond a reasonable doubt that a corporate employee had " 'a responsible share in the furtherance of the transaction which the statute outlaws.' " *Id.* at 669 (quoting *United States v. Dotterweich*, 320 U.S. 277, 284 (1943)). The Court upheld instructions that had merely required the jury to find "some measure of blame-worthiness" in the actions or inactions of the corporate officer. 421 U.S. at 674. The Court observed that, "[v]iewed as a whole, the charge did not permit the jury to find guilt solely on the basis of respondent's position in the corporation; rather, it fairly advised the jury that to find guilt it must find respondent 'had a responsible relation to the situation,'

and 'by virtue of his position . . . had . . . authority and responsibility' to deal with the situation," which the instructions defined elsewhere as " 'food . . . held in unsanitary conditions in a warehouse with the result that it consisted, in part, of filth or . . . may have been contaminated with filth.' " *Id.*

Park's reaffirmation of the Government's ability to draw the net of criminal responsibility broadly, without breaching Due Process precepts, was reaffirmed in *Patterson v. New York*, 432 U.S. 197 (1977). There the Court upheld jury instructions issued under New York law that placed the burden on the defendant of proving, as an affirmative defense, the defense of extreme emotional disturbance. Because the New York statute defined murder as "causing the death of another person with intent to do so," "[i]t is plain enough that if the intentional killing is shown, the State intends to deal with the defendant as a murderer unless he demonstrates the mitigating circumstances." *Id.* at 206.

Patterson is significant in that it recognized the "social cost" of requiring the State, beyond a reasonable doubt, to disprove affirmative defenses or to negate mitigating factors. *Id.* at 208. "To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate." *Id.* at 209. In distinguishing *Mulaney*, the Court reaffirmed that "the reasonable doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case[.]" 432 U.S. at 211. To hold otherwise, the Court observed, would be "to undermine legislative reform of

our criminal justice system." *Id.* at 215 n.15. The Court thus cautioned against carrying *Winship*, as refined by *Mullaney*, to a "logical extreme." *Id.*

In this case, the Montana Supreme Court has ignored the teachings of both *Park* and *Patterson*. As in *Park*, the State legislature has redefined the criminal law in a manner that simply places an important responsibility upon those who engage in a dangerous activity: voluntarily intoxicating themselves. Mr. Egelhoff, before he engaged in significant drinking, could have left his weapon with police, or taken other steps to ensure that any negative effects of his drinking would be restrained. As in *Park*, Respondent was imbued, under Montana law, with "a duty to implement measures that will insure that violations will not occur." 421 U.S. at 672. In barring Respondent from disproving deliberate homicide by proof of voluntary intoxication, Montana merely redefined the criminal law in a way this Court has upheld in the corporate context for fifty years.

The Montana Supreme Court's decision also undermines efforts at "legislative reform" in the States. Theoretically, nothing in *Patterson* would prohibit a State from achieving the ends targeted here by defining murder "as mere physical contact between the defendant and the victim leading to the victim's death," and then setting up "affirmative defenses," such as causing a death through unavoidable accident, by mistake, or as a result of a consensual medical procedure. *Patterson*, 432 U.S. at 224 n.8 (Powell, J., dissenting). The critical point here is that, to achieve the ends Montana seeks if its state court is upheld, Montana *must* have such a draconian statute. As *Patterson* recognizes, States are not limited to such an

"egregious" but "formalistically correct statute," *id.*, at n.9, and need not treat individuals who shoot others but do not "intend" in some sense to do so because they are voluntarily drunk, as meriting any defense arising out of that self-induced condition. As this Court noted more than twenty years ago, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike[.]" *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). By eliminating the issue of the effect of voluntary intoxication on an accused's mental state, Montana reaffirms this basic truth.

Nor is the Montana Supreme Court correct in characterizing the statutory framework, or the jury instructions that were given in this case, as being infected by *"Sandstrom"* error. *See Sandstrom v. Montana*, 442 U.S. 510 (1979). There, the Court held that giving an instruction stating that " 'the law presumes that a person intends the ordinary consequences of his voluntary acts' " violated the Due Process Clause because it impermissibly shifted to the defendant the State's burden to show that the homicide was "purposely or knowingly" perpetrated. 442 U.S. at 512. In this case, the State's burden was not shifted; rather, the burden of showing intent was effectively eliminated *to the extent* voluntary intoxication, rather than blameless mistake, accident, or consent, was the cause of the deaths of Pavola and Christianson.

For these reasons alone, the judgment must be reversed.

C. Given the Unique and Devastating Effects of Drugs and Alcohol on the States' Crime Rates, This Court Should Be Especially Solicitous of the States' Reform Efforts Here.

Although the straightforward doctrinal analysis, *supra*, demonstrates that the Montana Supreme Court's analysis cannot stand, the correct answer to the Question Presented here is best "illuminated if this issue is placed in historical context." *Mullaney*, 421 U.S. at 692. As the Court noted in *Mullaney*, "[a]t early common law only those homicides committed in the enforcement of justice were considered justifiable[.]" *Id.* Although in light of developments since the thirteenth century, some affirmative defenses (or the right to conviction of a lesser crime) might be constitutionally compelled, no reasoned reading of this Court's precedents warrants the conclusion that voluntary intoxication is one of those matters. To hold otherwise would defy not only lengthy precedent and history, but logic itself.

Under early American common law, voluntary intoxication was not a defense in a criminal prosecution, even though the intoxication had prevented the defendant from understanding his actions, having the required culpable mental state, or remembering the events. *See generally United States ex rel. Goddard v. Vaughn*, 614 F.2d 929, 934-35 & nn.5-7 (3d Cir. 1980). In the nineteenth century, the courts, in an effort to mitigate the common law rule, crafted a new rule, allowing evidence of voluntary intoxication to negate the required mental state in "specific intent" crimes, but making the evidence inadmissible for "general intent" crimes. *See generally* Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045, 1046-49

(1944); Paulsen, *Intoxication as a Defense to Crime*, 1961 U. Ill. L.F. 1, 10-11.

Montana and those States that have rejected this common law formulation have made a valid policy judgment that the dangers of the intoxicated actor warrant displacement of the "specific intent"/"general intent" dichotomy. Alcohol and other forms of intoxication, as this Court is well aware, account for a large portion of the criminal activity in America today.[7] As one court has noted, the"specific intent"/"general intent" rule "undermines the criminal law's primary function of protecting society from the results of behavior that endangers the public safety." *State v. Stasio*, 396 A.2d 1129, 1134 (N.J. 1979) (footnotes omitted). Thus, regardless of the culpable mental state demanded of the sober actor, "if a person casts off the restraints of reason and consciousness by a voluntary act, no wrong is done to him if he is held accountable for any crimes which he may commit in that condition." *McDaniel v. State*, 356 So.2d 1151, 1160-61 (Miss. 1978). Thus, in returning in some degree to the original common law formulation, Montana and other States have readopted "the old view that voluntary intoxication is such a dangerous vice that public order and discipline require that defendants should not be permitted to set it up as a defense." Note, *Intoxication as a Defense to a Criminal Charge in Pennsylvania – Sequel*, 76 Dick. L. Rev. 324, 331 (1976). Montana and other States have thus simply returned to a more objective model of

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[7] *See Rumsey*, 454 A.2d at 1124; Note, *Alcohol Abuse and the Law*, 94 Harv. L. Rev. 1660, 1681-82 (1981); Note, *Intoxication as a Criminal Defense*, 55 Colum. L. Rev. 1210, 1210 & n.1 (1955).

criminal responsibility motivated by utilitarian concerns of general deterrence. *See* Note, 55 Colum. L. Rev. at 1217; *cf. Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (objective model for constitutional civil rights liability for government officials).

These States have also recognized that, in the case of a voluntarily intoxicated defendant, it will be extremely rare for the accused to have failed to form the minimal requirements of conscious cognition and effect required for "knowledge." *Stasio*, 396 A.2d at 1134.[8] Legislatures that have abolished an accused's right to rely on voluntary intoxication have recognized that the use of such evidence runs an unacceptable risk of potential manipulation by defendants and confusion of juries, who may not adequately appreciate that intoxication evidence is to be used for the question of mental state, not for purposes of showing an excuse. *See generally Patterson*, 432 U.S. at 209 & n.11.

The Montana Supreme Court, however, found that Egelhoff had been denied " 'the right to a fair opportunity to defend against the State's accusations.' " 900 P.2d at 265, relying heavily on this Court's decision in

[8] "The great majority of moderately to grossly drunk or drugged persons who commit putatively criminal acts are probably aware of what they are doing and the likely consequences. In the case of those who are drunk, alcohol may have diminished their perceptions, released their inhibitions, and clouded their reasoning, but they still have sufficient capacity for the conscious mental processes required by the ordinary definitions of all or most specific mens rea crimes." Murphy, *Has Pennsylvania Found a Satisfactory Intoxication Defense*, 81 Dick. L. Rev. 199, 208 (1977).

Chambers v. Mississippi, 410 U.S. 284, 294 (1973). *Chambers*, however, will simply not bear the weight the Montana Supreme Court placed on it. There, this Court held that the cumulative effect of Mississippi's "voucher rule" and narrow hearsay exceptions effectively deprived a defendant charged with murder of the ability to prove a properly noticed alibi defense – a defense that went to the heart of whether the defendant inflicted any harm at all. *See* 410 U.S. at 295. There is no issue in this case that the State proved beyond a reasonable doubt that Egelhoff pulled the trigger, and *Chambers'* logic does not apply.

Nor is this a case where the important defense of self-defense has been precluded. *See Martin v. Ohio*, 480 U.S. 228, 233 (1987). In *Martin*, this Court suggested that if "self-defense evidence could not be considered in determining whether there was reasonable doubt about the State's case," a substantial federal issue might be presented. *Id.* at 233-34. But this case does not raise any of the important values that underlay a constitutional claim to the ability to put on a defense of self-defense. Mr. Egelhoff was not placed in the position of having to kill or be killed, and that simple fact warrants distinguishing *Martin*.

This Court's Due Process jurisprudence has recognized that, in this area, "the possible situations [are] too variable and that too much depend[s] on distinctions of degree to crowd them all into a simple formula." *Patterson*, 432 U.S. at 204 n.9. Montana law retains the general requirement that the State prove that Egelhoff acted "knowingly" or "purposely," and this required the State to prove beyond a reasonable doubt that Egelhoff did not kill accidentally or mistakenly. Had the evidence been

such that Egelhoff had, instead of shooting his victims at point blank range from the back seat of a station wagon, accidentally killed two unknown persons while taking "target practice" at some tin cans in the middle of a field, Egelhoff would have been entitled to an acquittal of the charge of deliberate homicide, even if he were voluntarily drunk. This is not a case where the elements of "knowledge" or "purpose" have been rendered surplusage by the statutory limit on the relevance of intoxication evidence. Rather, just as a rape-shield statute reaffirms a rape victim's right to say "no," Montana's statutory prohibition on voluntary intoxication evidence, for the purpose of negating the mens rea element of the offense of deliberate homicide, simply reflects an underlying value judgment about what conduct should be punished.[9]

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[9] Indeed, reversal in this case could have an effect upon the States' ability to exclude a variety of proof on the issue of mens rea, including perceptions of future duress, or necessity, or abused victim syndrome. Whether these various defenses ought to be permitted are important issues for the States, as well as Congress, and would be effectively eliminated from legislative consideration by a ruling in this case adverse to Montana.

CONCLUSION

For the foregoing reasons, the judgment of the Montana Supreme Court should be reversed, and the case remanded to that Court for further proceedings consistent with that disposition.

Dated: Honolulu, Hawaii, January 18, 1996.

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(9)

No. 95-566

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

JAMES ALLEN EGELHOFF,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL), headquartered in the District of Columbia, is a nationwide, nonprofit, voluntary association of criminal defense lawyers. Founded in 1958, it has a membership of more than 8,000 attorneys. Through cooperation with sixty-eight state and local criminal defense organizations, moreover, the NACDL speaks for more than 28,000 lawyers. It is the only national bar organization working for public and private criminal defense attorneys. It is an affiliated organization of the American Bar Association with full representation in the ABA House of Delegates.

The NACDL is dedicated to preserving and improving our adversary system of criminal justice. Among its goals are the promotion of fair administration of criminal justice; the protection of individual rights; and the improvement of the criminal law, its practices, and its procedures. As it does in this case, it appears frequently as *amicus curiae* to aid this Court in resolving issues that implicate those goals.

Both parties consented to the filing of this brief, as reflected in letters lodged with the Clerk of this Court.

STATEMENT OF THE CASE

Respondent James Allen Egelhoff spent most of July 12, 1992, drinking in bars and at a party in Lincoln County, not far from Montana's Idaho and British Columbia borders. *See Montana v. Egelhoff*, 900 P.2d 260, 261 (Mont. 1995); Tr. 1127:19-1130:18. About 9 p.m. he left the party with Roberta Pavola and John Christianson, who drove them away in Christianson's station wagon. 900

P.2d at 262; Tr. 1127:19-1130:18. Twenty minutes later respondent and Christianson – but not Pavola – bought beer at a grocery store. 900 P.2d at 262; Tr. 980:25-981:14, 1002:6-17.

Little is known about what happened the next two-and-a-half hours, until shortly before midnight, when Christianson's station wagon careened off a highway. 900 P.2d at 262; Tr. 291:14-292:23, 431:20-432:6. In the front seat were found Christianson and Pavola, each dead from a bullet to the head. 900 P.2d at 262; Tr. 301:9-310:20, 153:16, 170:1. On the floorboard near the brake pedal lay a .38-caliber pistol that belonged to respondent. 900 P.2d at 261-62; Tr. 558:3-8, 1116:1-3. Atop the flattened back seat was respondent, semiconscious. 900 P.2d at 262; Tr. 424:5-12, 73:19-25. He lay on his right side, facing away from the front. 900 P.2d at 262. When ambulance attendants arrived, respondent kept asking, "Did you find him?" *Id.* at 263; Tr. 547:20-23, 548:14-16, 1128:22-1130:18. Christianson's handgun was not recovered. Tr. 966:1-25, 1010:17-24, 679:3-681:14.

Respondent was charged with two counts of deliberate homicide under Mont. Code Ann. § 45-5-102 (1991), authorizing punishment of death or ten years to life in prison if the State proves beyond reasonable doubt that a person "purposely or knowingly cause[d] the death of another human being." *See* 900 P.2d at 261, 263.

The State endeavored to meet its burden with circumstantial evidence. It established gunpowder residue was on respondent's hands, *id.* at 262; Tr. 382-84. The bullet that killed Christianson "could have come from thousands of guns with characteristics" like respondent's; the bullet that killed Pavola was not recovered. 900 P.2d at 262; Tr. 102, 148:3-15.

The State adduced considerable "evidence which reflected on [respondent's] ability to shoot Pavola and Christianson despite his level of intoxication." 900 P.2d at 265. Through the direct testimony of Chief of Detectives Bernall jurors first learned that respondent's blood-alcohol concentration, or BAC, was .36 percent. Tr. 849. State witnesses also testified that respondent was "yelling obscenities" at the time he was found and that an hour later, he "was intoxicated, combative and cursing profusely." 900 P.2d at 262; *see* Tr. 478:57, 506, 533, 539-40. The State called Detective Gassett, who testified that officers tried "to physically restrain" respondent, who "continued to act wildly" for hours. 900 P.2d at 262; *see* Tr. 690, 692, 696-99, 701. It elicited that when respondent's photograph was taken he kicked the camera, indicating, in the lay opinion of Detective Gassett, that respondent's "coordination was good." 900 P.2d at 262.

When the State rested respondent moved to dismiss, arguing that given respondent's high BAC, the State had not proved he acted knowingly or purposely; indeed, it had not proved respondent acted at all. Tr. 954-56. The motion was denied. *Id.*

Before the jury respondent again challenged the State's theory that he had, knowingly and purposely, caused the deaths. He elicited, for example, that the gunpowder residue was inconsistent with the State's theory that he had shot the gun, yet consistent with respondent's position that he had not committed the acts but had lain prone in the car during the shootings. *Id.* at 555:23, 557:3-5, 565:24-566:1, 804:7, 806:18, 808:16.

To that same end respondent adduced evidence establishing the effects of his prodigious alcohol intake. Examination of an emergency technician restated that a

hospital test had measured respondent's BAC at .36. *Id.* at 990. The local physician who had examined respondent testified that respondent,

> judging from his blood alcohol level and his behavior, probably suffered from alcoholic 'blackout' at some point in time and for some period of time prior to the time of . . . examination. He also testified that an intoxicated person experiencing such a blackout may walk, talk, and fully function, with people around the person unable to tell that the person experienced a blackout.

900 P.2d at 263; Tr. 1042-47. Corroborating the physician's opinion about an alcoholic blackout was respondent's own testimony that he did not remember much of what happened after sundown, when he was still at the party. 900 P.2d at 262; Tr. 1108-34. He had a memory that he and Christianson – but not Pavola – had sat on a hill somewhere, passing a bottle of whiskey back and forth. 900 P.2d at 262. He did not remember leaving the party, being in the station wagon, the shootings, his comments to ambulance attendants, or events at the hospital. *Id.* at 262-63.

Rebutting the State's accusation that he had purposely and knowingly killed Pavola and Christianson, respondent used evidence of his intoxication to show that: (1) "his level of intoxication precluded him from undertaking the physical tasks necessary to have committed the homicides"; and (2) "he suffered from an alcoholic blackout which prevented him from recalling the events of the night in question." Brief for Petitioner State of Montana ("Pet. Brf.") at 9; *see* 900 P.2d at 264.

Despite this framing of issues, the State asked that jurors be given the following:

INSTRUCTION NO. 11

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the Defendant proves that he did not know that it was an intoxicating substance when he consumed the substance causing the condition.

Petition for Writ of Certiorari at 29a; *see* 900 P.2d at 263. Respondent objected, contending that the instruction, a nearly verbatim recitation of Mont. Code Ann. § 45-2-203 (1991),[1] was irrelevant and would unconstitutionally deprive respondent of process due him. Respondent's Brief in Opposition to Petition for Certiorari at 2; *see* 900 P.2d at 263. The trial court overruled the objection, and respondent was convicted and sentenced to eighty-four years in prison. 900 P.2d at 261, 263.

The Montana Supreme Court reversed. *Id.* at 267. Even though respondent had raised no affirmative defense related to intoxication, it reasoned, evidence of his .36 BAC "was relevant to the issue of whether

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[1] As amended in 1987, Section 45-2-203 provides:

> Responsibility – intoxicated condition. A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition.

See 900 P.2d at 264.

[respondent] acted knowingly and purposely," and the instruction "precluded the jury from considering it for that purpose." *Id.* at 264-65. In effect, the instruction permitted jurors to consider evidence of respondent's behavior in support of the State's argument that he knowingly and purposely shot Pavola and Christianson, but not to consider respondent's counterevidence on those issues. Instructing "that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense," *id.* at 263, may have misled jurors "into believing the State has proved the mental state beyond a reasonable doubt and that is why defendant cannot introduce evidence in opposition," *id.* at 266. The instruction thus violated respondent's fundamental due process " 'right to a fair opportunity to defend against the State's accusations,' " *id.* at 265 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973)). The court held that portion of Section 45-2-203 barring such consideration unconstitutional, and remanded for a new trial. *Id.* at 266-67.

SUMMARY OF ARGUMENT

In this case the Court confronts the unconstitutionality of an instruction that, pursuant to State statute, told jurors they could not consider evidence of voluntary intoxication as it relates to respondent's arguments. The instruction deprived respondent of the fundamental right to a meaningful opportunity to defend himself against the State's accusations, a right this Court repeatedly has enunciated. Scrutiny of three segments reveals that Instruction 11, based on Mont. Code Ann. § 45-2-203 (1991), compelled jurors to convict despite persuasive evidence that respondent did not commit the crimes. As

the Montana Supreme Court recognized in reversing the convictions, precluding jury evaluation of the defense position violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Arguments in favor of petitioner's self-described "policy choice" fail to justify this deprivation. Instruction 11 deviates from the deeply rooted, consistent Anglo-American tradition defining crime as the concurrence of act and will. That history is far stronger than less consistent rules that excluded evidence of intoxication out of concern, no longer valid given modern technology, that defendants might feign disabling intoxication.

The instruction is also irrational and arbitrary. It tells jurors to ignore medically recognized evidence of a defendant's inability to act knowingly or voluntarily, indeed of defendant's inability to act at all, if that inability stems from "voluntary intoxication." The instruction thus unreasonably defies medical consensus that one can be fully disabled, both mentally and physically, at the levels of intoxication at issue in this case.

Finally, the opinion below poses no more threat to evidence law than did this Court's precedents articulating the right to defend against the State's charges. Because that right was denied in an unconstitutional, arbitrary manner, the Court should affirm.

ARGUMENT

I. THE INSTRUCTION BARRING JURY CONSIDERATION OF RESPONDENT'S INTOXICATION COMPELLED A CONVICTION THAT IS FUNDAMENTALLY UNFAIR AND VIOLATIVE OF THE DUE PROCESS CLAUSE.

This Court granted review to answer the following question:

> Is a criminal defendant deprived of due process under the Fourteenth Amendment to the United States Constitution when a jury is instructed, pursuant to a state statute, that the jury may not consider evidence of the defendant's voluntary intoxication in determining the existence of a mental state which is an element of the criminal offense?

Pet. Brf. at i.

In one sense, the case at bar does not squarely present that question. Respondent James Allen Egelhoff did not seek to excuse or to justify killings committed while intoxicated on the theory that his intoxication rendered his acts neither purposeful nor knowing. *Id.* at 9. Rather, respondent adduced evidence that he had consumed a sometimes lethal dose of alcohol[2] to show that he simply could not have committed the crimes charged. *Id.* Thus, arguments of petitioner and its *amici curiae* that a State has near-absolute power to bar a defendant from adducing intoxication evidence as an excuse or justification are beside the point.

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[2] *See* Diagnostic and Statistical Manual of Mental Disorders 203 (4th ed. 1994) ("DSM-IV"); Mont. Hwy. Traffic Safety Div., Dept. of Justice, "BAC and You," attached as Appendix A ("App. A").

In another sense, this case presents the question in starkest relief. The contested instruction, an overbroad application of Mont. Code Ann. § 45-2-203 (1991), told jurors to ignore intoxication as it related to respondent's strong claims of actual innocence.[3] It thus compelled convictions that are fundamentally arbitrary and unfair, in violation of the Due Process Clause. This Court should affirm the Montana Supreme Court's reversal and let respondent's case proceed to a new and fair trial.

II. PETITIONER'S "POLICY CHOICE" CANNOT SURVIVE TRADITIONAL DUE PROCESS CLAUSE SCRUTINY.

The people of the United States vest in this Court the power and the duty to void State acts that violate our Federal Constitution. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 326-27 (1819); U.S. Const., arts. III, VI. It is against this backdrop that the repeated allusions of petitioner and its *amici* to States' policy-making role must be evaluated.[4] For although our Federal system entitles a State to " 'serve as a laboratory; and try novel social and economic experiments,' " it does not give it "the power to experiment with the fundamental liberties"

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[3] Respondent contended that he was actually innocent because he had not committed the shootings at all, let alone committed them knowingly and purposely. *See supra* at 3-5; *infra* at 15-19 & n. 7.

[4] *See* Pet. Brf. at 17-18; Brief for the United States ("U.S. Brf.") at 6, 8; Brief of the States of Hawaii, *et al.* ("States' Brf."), at 14-15; Brief *Amicus Curiae* of the Criminal Justice Legal Foundation ("CJLF Brf.") at 3-5, 8; Brief of The American Alliance for Rights and Responsibilities, *et al.*("AARR Brf."), at 2-4, 13.

protected by the Constitution. *Pointer v. Texas*, 380 U.S. 400, 413 (1965) (Goldberg, J., concurring) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting)). Thus this Court, even as it recognizes the importance of law enforcement to States' sovereign mission, does not shirk from striking experiments that violate principles "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), or otherwise deprive a defendant of rights "fundamental and essential to a fair trial," *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (internal quotation omitted), within our "American scheme of justice," *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). The Court invalidates such efforts pursuant to the Due Process Clause of the Fourteenth Amendment. *See, e.g., Griffin v. California*, 380 U.S. 609 (1965) (comment on failure to testify violated privilege against self-incrimination); *Gideon*, 372 U.S. at 342-45 (denial of counsel).

To determine whether a State secured a conviction in a fundamentally unfair manner, the Court examines numerous factors. Often it relies on analogous guarantees against Federal abuse enumerated in the Bill of Rights. *E.g., Duncan*, 391 U.S. at 148-49; *Washington v. Texas*, 388 U.S. 14, 17-23 (1967). It also assesses links between rights a defendant asserts and procedural due process guarantees. *E.g., Pointer*, 380 U.S. at 405. Rights subsumed in these guarantees also have been held fundamental; for example, the right to defend completely against the State's charges, *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), and the right to have that defense be considered by a jury, the sole arbiter of guilt or innocence, *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2080-81 (1995). The Court considers history and policy rationales, yet will not countenance a

practice that conflicts with American constitutional values. *E.g., Washington*, 388 U.S. at 19-23; *Palko*, 302 U.S. at 327 (Court will override practices irrational to the point of being "oppressive and arbitrary").

Petitioner, even while seeking this Court's imprimatur, concedes that the unusual "policy choice" by which it obtained these convictions cannot stand if it is irrational, unsupported by history and tradition, or otherwise exceeds the boundaries of the Due Process Clause.[5] Pet. Brf. at 35-36; *see also, e.g.*, U.S. Brf. at 6, 25 n. 15; CJLF Brf. at 26; AARR Brf. at 16. Those bounds were exceeded here when jurors were instructed to disregard evidence of intoxication in a way that removed from consideration issues essential to a fair verdict.

A. The Instruction Violated the Fundamental Due Process Right to Present a Defense for Jurors' Consideration.

Securely within the scope of fundamental due process lies the right to " 'a meaningful opportunity to present a complete defense,' " *Crane*, 476 U.S. at 690 (quoting

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[5] Petitioner avers that its policy "simply" treats a "voluntarily intoxicated" person the same as "a comparably-situated sober" person "by removing intoxication as a factor to be considered by the fact finder." Pet. Brf. at 17. The stated classification brings to mind the Equal Protection Clause of the Fourteenth Amendment. As in the due process context under review, this Court has not hesitated to invalidate classifications that, while embodying a State's "policy choice," could not be justified. *E.g., Skinner v. Oklahoma*, 316 U.S. 535 (1942) (striking State law, based on eugenic theory that criminal behavior is inherited, which subjected persons thrice convicted of certain felonies, but not those convicted of other, similar felonies, to compulsory sterilization).

California v. Trombetta, 467 U.S. 479, 485 (1984)); that is, to "defend against the State's accusations," *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). It encompasses guarantees enumerated in the Sixth Amendment and applied to the States by means of the Fourteenth Amendment; for example, the defendant's right not only "to have compulsory process for obtaining witnesses in his favor," *Washington*, 388 U.S. at 18, but also "to confront the witnesses against him," *Pointer*, 380 U.S. at 403. As a necessary component of the latter, a defendant must be afforded "a complete and adequate opportunity to cross-examine" adverse witnesses. *Id.* at 406-07. The defendant's "basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing,' " *Crane*, 476 U.S. at 690-91 (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984)), also bears strong relation to procedural due process guarantees of " 'an opportunity to be heard in his defense – a right to his day in court' " – by means of, " 'as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel,' " *Pointer*, 380 U.S. at 405 (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)). *See also Crane*, 476 U.S. at 690; *Washington*, 388 U.S. at 18. The right is " 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' " *Pointer*, 380 U.S. at 405, *quoted in Chambers*, 410 U.S. at 295.

Intertwined is the fundamental right to a jury trial, including "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty' . . . beyond reasonable doubt." *Sullivan*, 113 S. Ct. at 2080-81 (citing "interrelated" Fifth and Sixth Amendment roots); *see United States v. Gaudin*, 115 S. Ct.

2310, 2313-16 (1995). A defendant's efforts to resist the State's case and to offer his defense cannot be meaningful unless the jury is allowed to weigh those efforts in its deliberations. Among the precedents illustrating this point are *Chambers v. Mississippi*, 410 U.S. 284 (1973), on which the court below relied in concluding that this respondent's trial was fundamentally unfair, *Egelhoff*, 900 P.2d at 265, and *Washington v. Texas*, 388 U.S. 14 (1967).

In *Chambers*, the State tried a defendant for murdering a police officer who tried to arrest a youth amid "a hostile crowd," 410 U.S. at 285. The defendant, who maintained that he had not fired the fatal shots, sought to show that another man, McDonald, had confessed four times to the killing. *Id.* at 287-89. Although allowed to call McDonald, the defendant was barred by application of State law from cross-examining McDonald, who had recanted, or from calling witnesses to whom McDonald had confessed. *Id.* at 289-94. These preclusions "effectively prevented" a challenge to McDonald's recantations, *id.* at 297, making the defendant's contention that he was not the killer "far less persuasive than it might have been," *id.* at 294. The preclusions violated due process by denying the defendant his rights to confront and cross-examine adverse witnesses and to call witnesses in his favor. *Id.* at 295, 298-303. This Court reversed, expressing concern that the preclusions subverted jurors' ability to discharge their duty to sift evidence in search for the truth. *Id.* at 295, 303.

As in *Chambers*, the defendant in *Washington* maintained that he did not commit the malice-murder with which the State had charged him. 388 U.S. at 16. He sought to call Fuller, who would corroborate the defendant's testimony that Fuller had committed the shooting,

despite the defendant's efforts to stop him. *Id.* Pursuant to State law allowing coparticipants to testify against, but not for, a defendant, the request was denied. *Id.* at 16-17. This Court concluded that the denial rendered the defendant's right to compulsory process "futile" by preventing his "use" of Fuller, a favorable witness whose testimony was "relevant," "material," and "vital to the defense." *Id.* at 16, 23. It reversed the conviction obtained by blocking consideration of "the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Id.* at 19, 23.

Petitioner and its *amici* try to dilute the force of such precedents by asserting that this case does not involve a claim of actual innocence. Pet. Brf. at 13-14, 33, 36; States' Brf. at 7 & n. 6. *See* U.S. Brf. at 25-26 n. 15; CJLF Brf. at 6. Doubtless they seek to avert the special care this Court accords innocence claims that were obscured by unconstitutional trial errors. *E.g., Schlup v. Delo*, 115 S. Ct. 851, 860-61 (1995) (obstacles to review of successive habeas petitions must cede to innocence claim coupled with challenges based on constitutional due process doctrines); *Rose v. Clark*, 478 U.S. 570, 578-79 (1986) (denial of right to present innocence defense to jury reversible as structural error). But their assertions are unavailing.

Respondent, like the defendants in *Chambers* and *Washington*, maintained that he did not commit the murders with which the State charged him. Through cross-examination of adverse witnesses, his own testimony, and the testimony of favorable witnesses, respondent, to use petitioner's own words, sought to show that "his level of intoxication precluded him from undertaking the physical tasks necessary to have committed the homicides." Pet. Brf. at 9; *see supra* at 3-5. This same evidence tended,

as the court below recognized, to rebut the State's contentions that respondent committed the acts necessary, and did so knowingly and purposely. *Egelhoff*, 900 P.2d at 264-65. Had jurors been permitted to evaluate it fully, the evidence indeed would have provided grounds for acquittal. *Contra* U.S. Brf. at 26 n. 15. Close scrutiny of three critical segments of Instruction 11 evinces, however, that jurors were enjoined from undertaking that constitutionally mandated evaluation. *Contra* Pet. Brf. at 15-17.

1. 'An Intoxicated Person Is Criminally Responsible.'

Instruction 11's first segment admonished jurors that a "person who is in an intoxicated condition" – as respondent undisputedly was – "is criminally responsible for his conduct," *Egelhoff*, 900 P.2d at 263. A reasonable juror properly could have understood this to be a judicial declaration that respondent was "[a]ble to make moral or rational decisions" and was "answerable" for anything he might have done, regardless of the extent of his intoxication. *See* American Heritage Dictionary of the English Language 1537 (3d ed. 1992). Any conviction based on this understanding would violate settled principles of criminal liability, *infra* at 19-24, and the constitutional due process requirement of rationality, *infra* at 24-27. *Cf. Sandstrom v. Montana*, 442 U.S. 510, 517-19 (1979) (reversing because reasonable juror "could well have been misled" to unconstitutional result).

2. 'Intoxication Is No Defense to Any Offense.'

Next jurors were instructed that "an intoxicated condition is not a defense to any offense," 900 P.2d at 263.

The opinion below does not address this language from Mont. Code Ann. § 45-2-203 (1991), construing it to refer only to an affirmative defense, none of which was raised at trial.[6] This Court, however, ascribes a wider meaning to "defense." *E.g., Chambers*, 410 U.S. at 294 (term encompasses challenge to State's accusations). Likewise, a juror unaware of the concept of an affirmative defense reasonably could have interpreted the term more broadly. Ordinary meanings of "defense" include the "act of defending against attack," a "means or method of defending," and, in a legal context, the "action of the defendant in opposition to complaints against him," American Heritage Dictionary of the English Language 489 (3d ed. 1992). Reasonable jurors thus could have understood this segment to instruct them not to consider the evidence of intoxication to support points respondent made to defend himself against the State's charges. They thus would have ignored the physician's opinion and respondent's own

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[6] *See Egelhoff*, 900 P.2d at 264, 267-68 (Nelson, J., specially concurring). After correctly recognizing that no affirmative defense is at issue, the court below went awry in discussing *Martin v. Ohio*, 480 U.S. 228 (1987). *Egelhoff*, 900 P.2d at 265. The opinion in *Martin* reviews whether a State may treat self-defense – historically treated as a justification or excuse, *see* 4 W. Blackstone, Commentaries 183-84 (1769) ("Blackstone") – as an affirmative defense. 480 U.S. at 233. That has no bearing on the question at bar; that is, whether a State may deny a defendant of an opportunity to challenge its charges against him.

Disregarding this critical distinction, petitioner and *amici* devote portions of their briefs to affirmative defenses of excuse. *E.g.*, Pet. Brf. at 18 ("exculpatory excuse"); U.S. Brf. at 6-9, 11, 18-20 (referring to "excuses" like diminished capacity and entrapment); CJLF Brf. at 11, 17; AARR Brf. at 8, 22 (excuses like diminished capacity). Those discussions are beside the point here.

testimony that he probably had suffered an alcoholic blackout at the time of the shootings, which occurred in the hours before he was found prone in the station wagon. *See Egelhoff*, 900 P.2d at 262-63. Jurors would have remained free, however, to apply all the intoxication evidence to support the State's theories of the offense.

3. 'Intoxication Is Not To Be Considered in Determining Existence of Mental State.'

Instruction 11 continued: "and [an intoxicated condition] may not be taken into consideration in determining the existence of a mental state which is an element of the offense," 900 P.2d at 263. Read in conjunction with the language just discussed, this segment reasonably might have been construed to tell jurors to consider the intoxication evidence the State adduced to show respondent's mindset on the night of the shootings, but to ignore respondent's use of intoxication to rebut those same arguments. Furthermore, jurors might well have found it difficult to separate "mental state" elements from other elements of the offense of deliberate homicide. Indeed, such a separation would run counter to Montana law, which provides that the mental state set forth in a penal statute applies to each element of the offense.[7]

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[7] With two narrow exceptions not related to the case at bar, Montana law states that

> a person is not guilty of an offense unless, *with respect to each element* described by the statute defining the offense, a person *acts while having one of the mental states*. . . .

Mont. Code Ann. § 45-2-103(1) (1995) (emphasis added). Section 45-2-103(4) operates to apply the "knowingly or purposely"

Read together, these three segments told jurors to consider intoxication in support of the State's but not respondent's position, giving the State an unfair advantage like that decried in *Washington*, 388 U.S. at 16-17, 19. By ordering jurors to disregard vital, persuasive evidence of actual innocence for the sole reason that it related to intoxication, the instruction denied respondent his right to have jurors evaluate his challenge to the State's charges as effectively as if he had not been allowed to elicit any such evidence. *See id.* at 16; *see also Chambers*, 410 U.S. at 294, 297. It deprived respondent of the right to have jurors, and not the judge, find every fact essential to conviction beyond reasonable doubt. *See Sullivan*, 113 S. Ct. at 2080-81; *In re Winship*, 397 U.S. 358, 364 (1970). As discussed below, this deprivation of fundamental rights was irrational and unsupported by history, and thus fundamentally unfair.

B. History Does Not Justify This Deprivation of Rights Fundamental to a Fair Trial.

Petitioner and its *amici* advance two arguments based on legal history in an effort to justify denying respondent a full opportunity to defend himself. First, they argue that the law permits elimination of the mental-state requirement, even imposition of strict liability, if a defendant was voluntarily intoxicated. *See* Pet. Brf. at 29, 34; States' Brf. at 10; AARR Brf. at 5. Second, they argue that

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mental state prescribed for deliberate homicide in violation of § 45-5-102(1)(a) "to each element" of the offense. In effect, an argument that a person did not knowingly or purposely do an act is equivalent to an argument that the person did not do the act proscribed.

a common-law rule allows ordering jurors to ignore intoxication even if it would disprove the State's charges that a defendant acted knowingly and purposely. Pet. Brf. at 13, 19-20; U.S. Brf. at 20 & n. 10; States' Brf. at 14; CJLF Brf. at 9, 19; AARR Brf. at 8-9. As shown below, neither argument justifies the policy choice embodied in Instruction 11.

1. Longstanding Tradition Bars Strict Liability in Cases of Infamous, Common-Law Felonies.

An entrenched legal principle defines crime as the concurrence of guilty act, or *actus reus*, and guilty mind, *mens rea*. Reflecting the principle's long pedigree is the Latin canon *actus non facit reum, nisi mens sit rea*.[8] Leading Eighteenth Century commentators embraced the principle, "enshrined in the common law."[9] It endured in the

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[8] E. Coke, The Third Part of the Institutes of the Law of England 6, 107 (1797) ("Coke"). In English, it states, "An act does not make [the doer of it] guilty, unless the mind be guilty; that is, unless the intention be criminal. The intent and the act must both concur to constitute the crime." Black's Law Dictionary 36 (6th ed. 1990).

[9] P. Brett, An Inquiry into Criminal Guilt 38 (1963). Sources Brett cites, *id.* at 37-41, include: M. Foster, Crown Law 279 (3d ed. 1809) (citing Latin axiom that translates as "crime is not completed unless a guilty will is interposed"); Blackstone, *supra*, at 21 ("[T]o make a complete crime cognizable by human laws, there must be both a will and an act. . . . And, as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will; and secondly, an unlawful act consequent upon such will."); 1 W. Hawkins, Pleas of the Crown 1 (1716) ("The Guilt of offending against any Law whatsoever,

mid-Nineteenth Century, when the Fourteenth Amendment was ratified, as the Court itself recognized in *Morissette v. United States*, 342 U.S. 246, 251 (1952).[10] *See also* 1 J. Bishop, Commentaries on the Criminal Law § 227, at 260 (2d ed. 1858).

Indeed, in *Morissette* this Court traced the principle from ancient Greek and Biblical through modern times. 342 U.S. at 250-53 & n. 4. "[T]hat an injury can amount to a crime only when inflicted by intention," the Court wrote,

> is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. . . . [It] has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

Id. at 250-51 (footnote omitted). This Court followed "an unbroken course of judicial decision in all constituent states of the Union" to hold that intent to steal was an essential element of a theft statute that proscribed certain acts but articulated no *mens rea*. *Id.* at 261-62 & n. 19.

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necessarily supposing a wilful Disobedience thereof, can never justly be imputed to those who are either uncapable of understanding it, or of conforming themselves to it")).

[10] Petitioner's penal code still follows this tradition, defining crime as a concurrence of proscribed act and a requisite state of mind. Mont. Code Ann. § 45-2-103(1) (1995). It specifies that a "material element of every offense is a voluntary act," *id.* § 45-2-202, and forbids punishment based on an involuntary "reflex or convulsion," "bodily movement during unconsciousness or sleep," or "bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual," *id.* § 45-2-101(32).

Because the jury instructions had precluded consideration of this "ingredient of the crime charged," it reversed. *Id.* at 274-76.

Instruction 11 and Section 45-2-203, by compelling convictions of intoxicated defendants without proof beyond reasonable doubt of both guilty act and guilty mind, run counter to the principle reaffirmed in *Morissette*. Petitioner and its *amici* urge the Court to follow opinions they contend allow elimination of a *mens rea* element, pretermitting that *Morissette* itself explains why such strict-liability cases do not apply.[11]

As the Industrial Revolution exposed newly urbanized workers and consumers to mass health and safety hazards, the Court wrote, the law began to hold criminally liable, without proof of criminal intent, persons deemed to have violated a special duty not to cause harms related to those hazards. *Id.* at 253-61. But such absolute liability was limited to novel crimes "in the nature of neglect where the law requires care, or inaction where it imposes a duty" to the public, and not of "immediate," "positive aggressions" against a person, "with which the common law so often dealt," *id.* at 255-56. These " 'public welfare' " offenses carried small penalties and little stigma from conviction. *Id.*

The Court's refusal to conclude that Congress intended to apply the strict-liability doctrine to larceny,

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[11] Among the opinions on which they rely is *United States v. Dotterweich*, 320 U.S. 277 (1943). Pet. Brf. at 29, 34; States' Brf. at 10; AARR Brf. at 5. In so doing, they necessarily concede the pertinence of *Morissette*, in which this Court distinguished *Dotterweich*. 342 U.S. at 260.

"among the earliest offenses known to the law that existed before legislation,"[12] pertains here. Although in its narrowest sense the holding was one of statutory construction, it rested on a long-held, consistently followed, Anglo-American tradition of fairness, the same tradition that guides this Court's fundamental due process jurisprudence. *See infra* at 11. Application of that tradition here bars petitioner from using the absolute-liability doctrine to obtain a conviction for deliberate homicide, a crime that brings direct, irrevocable injury to an identified victim; that destroys a defendant's reputation; that may result in punishment by death; and that is, "of all felonies . . . the most hainous" at common law.[13] *See* Coke, *supra*, at 47.

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[12] *Id.* at 260. Petitioner's penal code comports with this principle by requiring a concurrence of act and intent, Mont. Code Ann. § 45-2-103(1) (1995), and by banning strict liability in crimes punishable by more than $500 absent "clearly indicate[d] . . . legislative purpose to impose absolute liability," *id.* § 45-2-104.

[13] Nothing in *Powell v. Texas*, 392 U.S. 514 (1968), compels a different conclusion. Under review was a bench conviction for public intoxication, a petty offense punished by a $20 fine. *Id.* at 517. The Court declined to hold, on the "utterly inadequate" record before it, that conviction of a defendant with "chronic alcoholism" would violate the Eighth and Fourteenth Amendments. *Id.* at 521, 536-67. Even assuming that the reference, without citation of authority, to "shifting adjustment" in offenses, *id.* at 535-36, allows leeway for minor offenses like that under consideration, the passage does not preclude application of the principles set forth in *Morissette* to an infamous crime carrying maximum stigma and punishment. *Contra* Pet. Brf. at 34; U.S. Brf. at 9; CJLF Brf. at 4-5; AARR Brf. at 16. Underlying *Powell*, moreover, is the settled premise that the Court has the power and duty to strike a State practice that violates the Fourteenth Amendment. *See infra* at 9-11.

2. Outdated Intoxication Rules Do Not Justify This Denial.

Petitioner and its *amici* also invoke an old common-law rule barring evidence of intoxication. Pet. Brf. at 13, 19-20; U.S. Brf. at 20 & n. 10; States' Brf. at 14; CJLF Brf. at 9, 19; AARR Brf. at 8-9. Assuming *arguendo* the rule was followed at common law,[14] it cannot justify the deprivation this respondent suffered by application of Instruction 11.

As petitioner and its *amici* concede, by the mid-Nineteenth Century some jurisdictions allowed consideration of intoxication in mitigation of crime. U.S. Brf. at 21; CJLF Brf. at 19-22; AARR Brf. at 9-11; *see* Pet. Brf. at 21; States' Brief at 14. The old common-law rule thus was no longer deeply rooted at the time the Fourteenth Amendment was ratified.

The trend toward some mitigation continued, and it is the majority rule today. AARR Brf. at 12; *contra* Pet. Brf. at 23. *See generally* Appendix B ("App. B") (listing State rules touching on intoxication issue). *Cf. Chambers*, 410 U.S. at 296 n. 9 (noting Federal evidence rules abolished State's policy); *Washington*, 388 U.S. at 17 (noting uniqueness of statute it holds unconstitutional). Furthermore, examination of authorities cited to argue that ten States follow the precise policy petitioner seeks to justify, *see* Brief of States as Amici Curiae in Support of Petition for Writ of Certiorari at 4 n. 1, shows that only three –

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[14] *But see* H. Eckenrode, Revolution in Virginia 148 (1916) (in Virginia at time of American Revolution, "[d]runkenness was 'regarded by the Fathers as a palliating circumstance in almost every crime from failure to attend church to treason' "), *quoted in* C.C. Pearson *et al.*, Liquor and Anti-Liquor in Virginia 1619-1919 at 45 (1967).

Delaware, Hawaii, and Missouri – have upheld rules embodying the policy against constitutional due process challenges. Six of the others – Arizona, Arkansas, Georgia, Mississippi, South Carolina, and Texas – have approved preclusion of consideration of intoxication without undertaking constitutional analysis. The remaining State, Pennsylvania, in fact allows such evidence to reduce the degree of a murder charge. *See* App. B.

Grounding the common-law rule, moreover, was a concern that responsible defendants would escape liability by exaggerating the degree and effect of their intoxication. Pet. Brf. at 20; U.S. Brf. at 20 n. 10; AARR Brf. at 8-9. Modern procedures for precise measurement of a person's blood-alcohol concentration have erased that concern. Indeed, petitioner and all States rely on those procedures as the linchpin of their own laws against drinking and driving. *See* App. A; U.S. Dept. of Commerce, Econ. & Statistics Admin., Bureau of Census, Statistical Abstract of the United States 641 (115th ed. 1995) ("Statistical Abstract"). Therefore, the common-law rule should be rejected as an anachronism. *Cf. Washington*, 388 U.S. at 21-22 & n. 18 (in striking rule based on outdated mistrust of jurors' intelligence, Court approved of precedent "refusing to be bound by 'the dead hand of the common-law rule of 1789' ") (quoting *Rosen v. United States*, 245 U.S. 467, 471 (1925)); *cf. also Chambers*, 410 U.S. at 295-97.

The uncertain and outdated common-law rule pales in comparison with the ancient and still valid principle affirmed in *Morissette*. Petitioner thus has failed to justify its deviation from the deeply rooted, traditional definition of crime as the unity of act and will.

C. The Instruction Arbitrarily Denied Due Process.

Petitioner and its *amici* would justify Instruction 11 as a permissible substitution of a required mental state with the immorality of intoxication, and as a deterrent to alcohol-related crime. *See* Pet. Brf. at 17, 35-36; U.S. Brf. at 6, 8, 25 n. 15; States' Brf. at 8, 12; AARR Brf. at 7-8, 16. Both justifications turn a blind eye to the realities of intoxication, realities that render the State's policy unconstitutionally oppressive and arbitrary. *See Palko*, 302 U.S. at 327.

For many persons alcohol intake is an aspect of a recognized medical condition. Of more than a dozen recognized mental disorders related to alcohol, the gravest entail medical conditions that "can affect nearly every organ," "are usually permanent and may worsen even if the substance use stops," DSM-IV, *supra*, at 195, 200, 153. "More persistent central nervous system effects include cognitive deficits, severe memory impairment, and degenerative changes in the cerebellum." *Id.* at 200. A person so afflicted may not be subject to deterrence, and the badness that initiated intoxication long has passed. It defies common sense, *contra* Pet. Brf. at 12, to tell jurors to ignore the person's recognized physical and mental deficiencies, for the sole reason that "voluntary intoxication" caused them. *Cf. Sandstrom*, 442 U.S. at 512, 527 (deliberate-homicide conviction of defendant who argued he could not form intent because of "personality disorder aggravated by alcohol consumption" reversed on ground jurors were told to presume the contrary).

The result in this case is likewise irrational. A test hours after the shootings measured respondent's BAC at .36 percent, meaning that there were three and two-thirds

parts alcohol for every thousand parts blood. *See* App. A. That is three-and-a-half times above the point at which Montana and most other States deem a person under the influence of alcohol, so impairing judgment that the person may not legally drive a vehicle. *Id.*[15] Indeed, more than judgment is hindered. As a brochure from petitioner's Department of Justice explains, at a BAC of .09 to .15 the cerebellum, the brain's "essential link in coordinating sensory impulses and motor activity," is affected. *Id.* At the next tier, .16 to .30, the medulla, "which controls involuntary functions, may be affected," and "[u]nconsciousness may occur." *Id.* Above .30, the tier at which respondent tested,[16]

> most people are not in a position to drink anymore. *They are usually comatose and will remain in a coma until the body has disposed of enough alcohol so that the nerve centers controlling consciousness may begin to function again. It is important to note that persons in this condition are near the point of death and may die if left unattended.*

Id. (emphasis added). *See* DSM-IV, *supra*, at 203 (citing sleep and loss of sensation as effects at "very high" BAC of .20 to .30, and inhibited breathing and pulse, "even death," at .30 to .40).

Far from taking these gradations into account, Instruction 11 required jurors to ignore them. Respondent argued that he was in a blackout – not moving at all,

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[15] *See also* Statistical Abstract, *supra*, at 641. In a fifth of the States, this BAC was four-and-a-half times past that point. *Id.*

[16] In fact, respondent's BAC likely was even higher than .36 at the time the shootings took place. App. A (explaining process by which alcohol is eliminated from the body); DSM-IV, *supra*, at 203.

moving involuntarily, or functioning without comprehension of his movements. *See Egelhoff*, 900 P.2d at 263, Tr. 1042-47. Yet jurors were barred from considering that recognized medical condition as it related to respondent's challenges to the State's accusations, solely because it stemmed from "voluntary intoxication." This made no sense; by the same process a person who, while passed out from drinking, rolled over and smothered another could be convicted of deliberate homicide. Given the absence of *mens rea* or *actus reus*, there would be no crime to deter. Justifications based on immorality would raise serious concerns of proportionality, if used to subject to maximum punishment a person who either caused a death while disablingly intoxicated or was innocent of the killing but, because of alcohol-induced amnesia, could not refute the State's contrary accusation. *Cf. Powell*, 392 U.S. at 528 (citing "brief jail term" as appropriate penalty for petty offense of public intoxication); Mont. Code Ann. § 45-5-102(1)(b) (1995) (designating felonies for which intent may be transferred on felony-murder theory).

In short, by instructing jurors to suspend reality and convict whenever "voluntary intoxication" is the reason a defendant lacked the requisite mental state, or did not act voluntarily and in concurrence with that mental state, the State's policy invites the kind of arbitrary and capricious State action that the Due Process Clause condemns.

III. RECOGNITION THAT THIS PRACTICE VIOLATES TENETS OF DUE PROCESS DOES NOT THREATEN SETTLED EVIDENCE LAW.

In further challenge to the right to defend articulated below, petitioner's *amici* point to the following:

> We conclude that the defendant had a due process right to present and have considered by the jury all relevant evidence to rebut the State's evidence on all elements of the offense charged.

Egelhoff, 900 P.2d at 266. They maintain that the reference to "all relevant evidence" imperils longstanding rules excluding certain evidence.[17] This stated concern, which the instant discussion reveals as a misapprehension of the opinion below, is the sole reason the United States seeks to comment on this case. *See* U.S. Brf. at 1-2. Even cursory inquiry, however, demonstrates that the Montana Supreme Court intended no such radical change.

Amici must assume that "relevant" means only "logically relevant"; that is, that it denotes all evidence bearing a link to a fact to be proved. *See* R. Carlson, *et al.*, Evidence in the Nineties 189, 311 (3d ed. 1991) ("Carlson"); *see also* Fed. R. Evid. 401 & Advisory Committee Note. But "relevant" has another traditional meaning: logically relevant evidence routinely is excluded, for various policy reasons, as not "legally relevant." Carlson, *supra*, at 311-12; *see* J. Strong, McCormick on Evidence § 185, at 341 (4th ed. 1992); 1A J. Wigmore, Evidence § 28, at 969 (Tillers rev. ed. 1983). Fed. R. Evid. 403 and other

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[17] *See* U.S. Brf. at 1-2, 25-26; States' Brf. at 1; CJLF Brf. at 18-19; AARR Brf. at 25. This stated concern, misapprehending the opinion below, is the sole interest articulated by the United States, U.S. Brf. at 1-2, although the bulk of its brief treats other issues.

rules embodying policies limiting evidence fall within this doctrine of legal irrelevancy. Carlson, *supra*, at 311. In this sense, therefore, the reference in the opinion below to "all relevant evidence" has no effect on settled rules of evidence.

Examination of the Montana Rules of Evidence bolsters this conclusion. Mont. Code Ann., tit. 26, ch. 10 (1995) ("Mont. R. Evid."). In effect since 1977, these rules correspond to the Federal Rules of Evidence in numbering, structure, and content. Like the Federal rules, the Montana rules authorize the exclusion of "relevant evidence . . . as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state." Mont. R. Evid. 402; *see* Fed. R. Evid. 402. The Montana and the Federal rules allowing exclusion of logically relevant but unduly prejudicial evidence are identical. *Compare* Mont. R. Evid. 403 *with* Fed. R. Evid. 403. Other rules barring evidence deemed legally irrelevant, as that term is used above, are substantially alike. *Compare, e.g.*, Mont. R. Evid. 404-09, 411 *with* Fed. R. Evid. 404-09, 411. Furthermore, whereas Fed. R. Evid. 501 leaves development of privileges to common law, Montana by statute excludes testimony that falls within explicit privileges ranging from spousal and attorney-client to student-counselor and audiologist-client. *See* Mont. Code. Ann. §§ 26-1-801 to 26-1-903 (1995); *see also* Mont. R. Evid. 501-05.

These embedded State rules barring some logically relevant evidence, coupled with the dual meaning of "relevant," establish that the Montana Supreme Court did not decimate the law of evidence any more than this Court did in its opinions enforcing the constitutional

right to present a defense. *E.g., Washington*, 388 U.S. at 23 n. 21; *see also Chambers*, 410 U.S. at 295.

CONCLUSION

The judgment of Montana Supreme Court, which upheld settled constitutional due process principles, should be affirmed so that this case may proceed to a new and fundamentally fair new trial.

Respectfully submitted,

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FACTS

Only time will sober up a drunk.

Cold showers—exercise—black coffee—don't work.

All you have is a wet drunk—a tired drunk—an awake drunk—BUT STILL A DRUNK.

Graphs—charts & graphics and some text reprinted by permission of the American Automobile Association

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BAC

Blood Alcohol Concentration

AND YOU

Prepared by

Montana Highway Traffic Safety Division
Department of Justice

WHAT IS BAC?

When a person consumes an alcoholic beverage, the alcohol is quickly and directly absorbed into the bloodstream without being digested, and then distributed to the body cells. As more is taken in, the percentage of alcohol in the blood rises. This alcohol in the blood is called the blood alcohol concentration or BAC. The BAC can be measured accurately by using a breath, urine or blood sample. This measurement indicates parts of alcohol in relation to parts of blood. When the blood alcohol concentration reaches a level of .10%, it means that there is one part alcohol for every thousand parts of blood. In Montana it is unlawful to drive or be in actual physical control of a motor vehicle when the BAC level is .10% or more.

WHAT DETERMINES BAC?

The percentage of alcohol in the blood depends basically on three things:

1. **Body Weight:** A heavier person has more body fluids; therefore can consume more alcohol than a lighter person, and still have the same percentage of alcohol in the blood.
2. **Amount of Alcohol Consumed:** "Standard" drinks all contain the **same amount of alcohol.** A "standard" drink is a 12 ounce can or bottle of beer, a 5 ounce glass of most wines and 1½ ounces (1 shot) of liquor. Beer has 5% alcohol, most wines have 12%, and 80 proof liquor has 40%. Multiply the volume of the drink by the percentage of alcohol in each, and your answer is the amount of alcohol your body is taking in. In these "standard" drinks, each contains .60 ounces of alcohol.
3. **Drinking Time:** The more drinks consumed in a shorter period of time, the higher the BAC. Three drinks in one hour will cause a higher BAC than one drink each hour for three hours.

Eating before or while drinking tends to slow the absorption rate of the alcohol into the bloodstream, but eventually all of the alcohol consumed gets into the blood.

The following chart is a guide to determine various blood alcohol percentages. Use the weight closest to yours.

BAC CHART

After hours	1 Drink				2 Drinks				3 Drinks				4 Drinks			
	4	3	2	1	4	3	2	1	4	3	2	1	4	3	2	1
Weight pounds																
80	–	–	–	.02	–	–	.05	.08	.07	.10	.10	.10	.12	.12	.15	.15
100	–	–	–	.02	–	–	.04	.06	.05	.07	.08	.09	.09	.10	.12	.13
120	–	–	–	.02	–	–	.03	.04	.03	.04	.06	.06	.06	.08	.09	.11
140	–	–	–	.01	–	–	.02	.04	.02	.03	.05	.05	.04	.06	.08	.09
160	–	–	–	.01	–	–	.02	.03	.01	.02	.04	.05	.03	.04	.06	.08
180	–	–	–	.01	–	–	.01	.02	–	.02	.03	.04	.02	.04	.05	.07
200	–	–	–	–	–	–	.01	.02	–	.01	.03	.04	.01	.03	.04	.06

After hours	5 Drinks				6 Drinks				7 Drinks				8 Drinks			
	4	3	2	1	4	3	2	1	4	3	2	1	4	3	2	1
Weight pounds																
80	.17	.17	.19	.20	.19	.22	.22	.25	.25	.27	.27	.30	.29	.30	.32	.33
100	.13	.14	.16	.17	.16	.18	.19	.21	.20	.22	.23	.25	.24	.25	.27	.29
120	.09	.11	.13	.14	.13	.14	.16	.17	.13	.17	.19	.20	.19	.20	.22	.23
140	.07	.09	.10	.12	.10	.12	.13	.15	.13	.14	.16	.17	.15	.17	.18	.20
160	.06	.07	.08	.10	.08	.09	.11	.13	.10	.12	.13	.15	.13	.14	.16	.17
180	.04	.06	.07	.09	.06	.08	.09	.11	.09	.10	.12	.13	.11	.12	.14	.15
200	.03	.04	.05	.06	.05	.07	.08	.09	.07	.09	.10	.12	.09	.10	.13	.13

Numbers equal the percentage of alcohol in the blood. Dash (–) = a trace of alcohol.

Example: A 180 pound person who has consumed 4 drinks in 3 hours will have a BAC level of .04%.

HOW DOES BAC AFFECT BEHAVIOR?

When the alcohol in the bloodstream reaches the brain, it immediately begins to affect the way a person behaves. The effects are present with just one drink. The following BAC levels are based on a 140 pound person who has consumed the alcohol over a short period of time (1-2 hours):

1-2 drinks (.01 to .04 BAC) Affected first are the outer layers of the cerebrum, (area #(1) on the following picture) which contains the centers of association of the brain, e.g. judgment, reason and inhibitions.

3-4 drinks (.05 to .08 BAC) The alcohol now reaches further into the cerebrum, (area #(1) on the following picture). At this point higher motor and sensory areas are affected, causing a decrease in fine skills and a person's ability to respond and perform. People are likely to become noisy, more talkative and moody, but feel more alert and capable. Yet in truth, there has been a reduction in their reaction time, judgment, and ability to respond to emergencies.

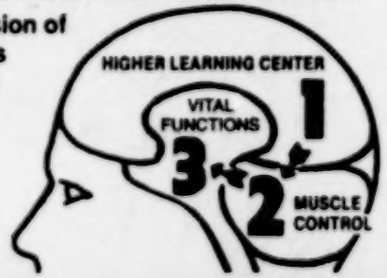
5-7 drinks (.09 to .15 BAC) Now the alcohol extends into the cerebellum, (area #(2) on the following picture) the essential link in coordinating sensory impulses and motor activity. The drinkers' senses of hearing, speech, vision and balance are altered. Decreased sense of pain, staggered walk, and slurred speech may also be evident.

8-12 drinks (.16 to .30 BAC) The entire cerebellum, as well as portions of the medulla (area #(3) on the following picture), which controls involuntary functions, may be affected. Reflexes are depressed, body temperature may go down and circulation is impaired. Unconsciousness may occur. Gross intoxication of all physical and mental faculties is evident.

More than 12 drinks (.30 and above BAC) By this time most people are not in a position to drink anymore. They are usually unconscious and will remain in a coma until the body has disposed of enough alcohol so that the nerve centers controlling consciousness may begin to function again. It is important to note that persons in this condition are near the point of death and **may** die if left unattended.

ALCOHOL AND YOUR BRAIN

Progression of Alcohol's Sedative Effects



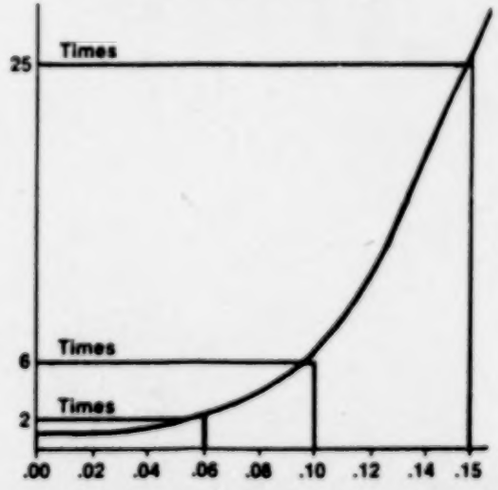
BAC AND DRIVING

If you drink and drive you automatically increase the risk of becoming involved in an accident. The more you drink, the greater the risk becomes. Certain standards have been adopted to identify drinking drivers. They are:

.01 to .05% BAC	A driver is **affected**. Chances of an accident increase.
.05 to .10% BAC	A driver is **impaired**. Chances of an accident double. At this BAC level the driver **could** be arrested for DUI.
.10% BAC	A driver is **intoxicated**. Chances of an accident are 6 times greater. Driver is also considered legally drunk.
.15% BAC	Chances of an accident are 25 times greater than when sober.

In one-half of all highway fatalities, alcohol is involved. In alcohol-related crashes, about one-half of those killed are not the ones who had been drinking.

BAC and Accidents



BAC AND YOUNG DRIVERS

(16 to 24 age group)

When young drivers drink and drive, they face two relatively new situations . . . **learning to drive** and **learning to drive after drinking.**

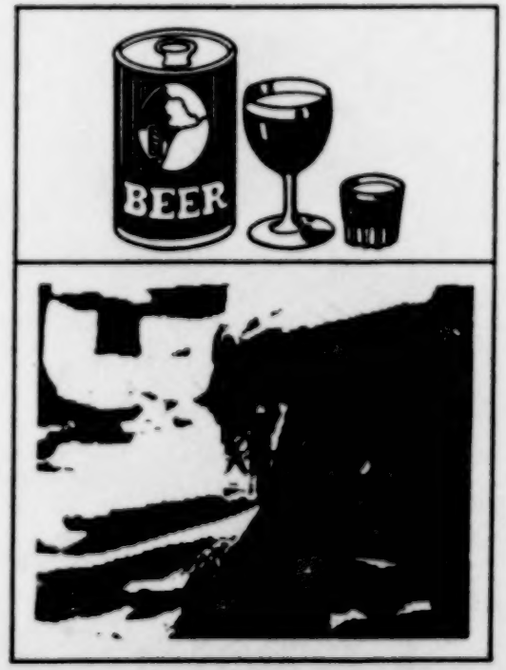
Here are the facts:***

About one fourth of all drivers are under the age of 25, yet they account for over 40% of all accidents, and 47% of all alcohol-related accidents.

Young drivers are involved in 50% more fatal alcohol-related accidents than other drivers.

70% of the young persons killed each year are a result of alcohol-related crashes.

(***source: 1983 Montana Highway Patrol Accident records)



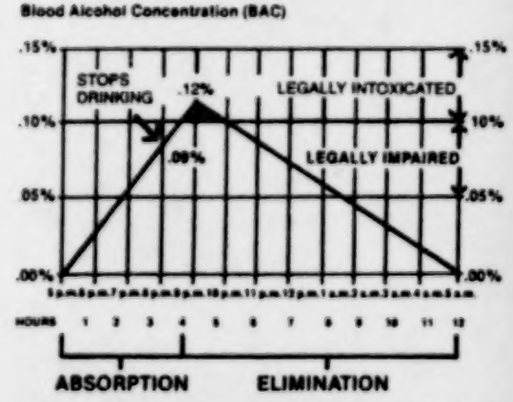
BAC ELIMINATION

It takes 20 to 40 minutes after a drink has been consumed for all of the alcohol to be absorbed into the body. Because of this, when you stop drinking, your BAC will continue to rise for a period of time.

An average person's body will eliminate alcohol at the rate of .015% BAC per hour. This is done through breathing, sweating and through the liver. However, the liver must handle 90% of the alcohol elimination, and the liver never changes speed, so the rate of elimination remains constant. As a result of this slow elimination process, a person remains intoxicated and/or impaired for an extended period of time.

When the BAC level has reached its highest point and starts to decline, people perceive themselves as being more sober than they really are. They use their highest BAC level as their reference point—not when they were sober. BE CAREFUL!

ELIMINATION RATE*



*150 POUND PERSON DRINKING ON AN EMPTY STOMACH CONSUMES 6 DRINKS IN 3 HOURS

APPENDIX B – STATE RULES

Alabama Criminal Code Annotated (1994)
Sec. 13A-3-2. Intoxication

• • • •

Alaska Statutes Annotated (1995)
Sec. 11.81.630. Intoxication as a defense

• • • •

Arizona Revised Statutes Annotated (1995)
Sec. 13-503. Effect of Intoxication; consideration by the jury.

• • • •

Arkansas Penal Code Annotated (1995)
Sec. 5-2-207. Intoxication.

• • • •

California Penal Code Annotated (1995)
Sec. 19.6(22). Evidence of voluntary intoxication.

• • • •

Colorado Revised Statutes Annotated (1989)
Sec. 18-1-804. Intoxication

• • • •

Connecticut General Statutes (recodified 1995)
Sec. 53a-7. Intoxication

• • • •

Delaware Penal Code Annotated (1995)

Title 11, sec. 421. Voluntary intoxication.

Title 11, sec. 423. Involuntary intoxication as a defense.

Title 11, sec. 424. Definitions relating to intoxication.

• • • •

Florida Statutes Annotated (1995 ed.)
Sec. 3.04(g). Voluntary Intoxication (Instruction)

• • • •

Georgia Criminal Code Annotated (1995)
Sec. 26-704. Intoxication.

• • • •

Hawaii Revised Statutes Annotated (1987)
Title 37, sec. 702-230. Intoxication.

• • • •

Idaho Code (1995)
Sec. 18-116. Intoxication no excuse for crime.

• • • •

Illinois Annotated Statutes (1989)
Chapter 720, sec. 5/6-3. Intoxication or drugged condition.

• • • •

Indiana Code Annotated (1995)
35-41-3-5. Intoxication

• • • •

Iowa Penal Code Annotated (1995)
Sec. 701.5. Intoxicants or drugs.

• • • •

Kansas Statutes Annotated (1995)
Chapter 21, sec. 21-3208. Intoxication

• • • •

Kentucky Revised Statutes Annotated (1994)
Sec. 501.080. Liability – Intoxication.

• • • •

Louisiana Revised Statutes Annotated (1995)
Tit. 14, sec. 15. Intoxication.

• • • •

Maine Revised Statutes Annotated (1995)
17-A-M.R.S.A., Sec. 37

• • • •

Maryland
Hook v. Maryland, 315 Md. 25, 553 A.2d 233 (1989) (voluntary intoxication defense to specific intent crimes).

• • • •

Massachusetts
Massachusetts v. Freiberg, 405 Mass. 282, 540 N.E.2d 1289 (voluntary intoxication is a defense to specific intent crimes), cert. denied, 493 U.S. 940 (1989).

• • • •

Michigan
Michigan v. Garcia, 398 Mich. 250, 247 N.W.2d 547 (1976) (voluntary intoxication is a defense to specific intent crimes).

• • • •

Minnesota Statutes Annotated (1995)
Title 40, sec. 609.075. Intoxication as defense.

• • • •

Mississippi
Lanier v. Mississippi, 533 So.2d 473 (1988) (voluntary intoxication is not a defense).

• • • •

Missouri Revised Statutes (1995)
Sec. 562.076. Intoxicated or Drugged Condition

• • • •

Nebraska
Nebraska v. Lixey, 238 Neb. 540, 471 N.W.2d 444 (1991) (voluntary intoxication is relevant to mental state).

• • • •

Nevada Revised Statutes Annotated (1991)
Sec. 193-220. Voluntary intoxication no excuse for crime; when it may be considered.

• • • •

New Hampshire Revised Statutes Annotated (1986)
Title 62, sec. 626: 4. Intoxication.

• • • •

New Jersey Statutes Annotated (1993 supp.)
Sec. 2C: 2-8. Intoxication

• • • •

New Mexico
New Mexico v. Privett, 104 N.M. 79, 717 P.2d 55 (1986) (voluntary intoxication is defense to specific intent).

• • • •

New York Penal Law Annotated (1992)
Sec. 15.25. Effect of intoxication upon liability.

• • • •

North Carolina
North Carolina v. Mash, 328 N.C. 61, 372 S.E.2d 532 (1988) (voluntary intoxication relevant to specific intent).

• • • •

North Dakota Century Code Annotated (1985)
Sec. 12.1-04-02. Intoxication.
12.1-04-04. Evidence of intoxication is admissible whenever it is relevant to negate or to establish an element of the offense charged.

• • • •

Ohio
Ohio v. Fox, 68 Ohio St.2d 53, 428 N.E. 2d 410 (1981) (voluntary intoxication relevant for specific intent crimes).

• • • •

Oklahoma Statutes Annotated (1983)
Title 21, sec. 153. Intoxication no defense.

But see Valdez v. Oklahoma, 900 P.2d 363, 379 (Okl.Cr. 1995).

• • • •

Oregon Revised Statutes Annotated (1990)
Sec. 161.125. Intoxication; drug or controlled substance dependence as defense.

• • • •

Pennsylvania Statutes Annotated (1983)
Title 18, sec. 308. Intoxication or drugged condition.

• • • •

Rhode Island
Rhode Island v. Sanden, 626 A.2d 194 (R.I. 1993) (voluntary intoxication relevant to specific intent).

• • • •

South Carolina
South Carolina v. Vaughn, 232 S.E.2d 328 (1977) (voluntary intoxication not a defense).

• • • •

South Dakota Codified Laws Annotated (1988)
Sec. 22-5-5. Voluntary Intoxication – Crimes involving motive or intent.

• • • •

Tennessee Code Annotated (1991)
Sec. 39-11-503. Intoxication.

• • • •

Texas Penal Code Annotated (1974)
Sec. 8.04. Intoxication.

• • • •

Utah Code Annotated (1990)
Sec. 76-2-30-6. Voluntary intoxication.

• • • •

Vermont
Vermont v. Dennis, 151 Vt. 223, 559 A.2d 670 (1989) (voluntary intoxication relevant to specific intent).

• • • •

Virginia
Hatcher v. Virginia, 241 S.E.2d 756 (Va. 1978) (voluntary intoxication relevant to specific intent crimes).

• • • •

Washington Revised Code Annotated (1988)
Sec. 9A.16.090. Intoxication.

• • • •

West Virginia
West Virginia v. Keeton, 166 W.Va. 77, 272 S.E.2d 817 (1980) (voluntary intoxication relevant to lower degree of offense).

• • • •

Wisconsin Statutes Annotated (1995)
Chapter 939, sec. 42. Intoxication.

• • • •

Wyoming Statutes Annotated (1995)
Title 6, sec. 6-1-202. Being under the influence not a defense; effect upon intent; "self-induced."

No. 95-566

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF MONTANA,

Petitioner,

vs.

JAMES ALLEN EGELHOFF,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Montana

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the Due Process Clause prevent a state from reducing intoxication-related crime by holding intoxicated offenders as accountable as their sober counterparts?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves an unprecedented expansion of defendant's right to present evidence. This will needlessly disrupt the law of evidence and frustrate an important social policy designed to limit crime. This is contrary to the interests CJLF was formed to protect.

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1. Both parties have consented in writing to the filing of this brief.

SUMMARY OF FACTS AND CASE

Defendant was charged with two counts of deliberate homicide. *State* v. *Egelhoff*, 900 P. 2d 260, 261 (Mont. 1995). He claimed he suffered from alcohol-induced amnesia which prevented him from recalling the killings. See *id.*, at 262-263. Pursuant to Montana law, defendant was not allowed to submit evidence that his intoxication prevented him from forming the necessary mental element for deliberate homicide. See *id.*, at 265. The prosecution presented considerable evidence that defendant had the necessary *mens rea*: his unslurred speech, his repeated attempts to avoid detection, his attempted flight, his coordination, and his attempt to drive from the back seat. See *ibid*. A jury convicted defendant on two counts of deliberate homicide. *Id.*, at 263.

The Montana Supreme Court reversed both convictions. It found that under dicta in *Martin* v. *Ohio*, 480 U. S. 228 (1987) defendant had a right to present evidence relevant to raising reasonable doubt about an element of the crime. See *Egelhoff*, 900 P. 2d, at 265-266. Montana's decision to prevent defendant's use of his voluntary intoxication for exculpation violated this mandate. See *id.*, at 266.

SUMMARY OF ARGUMENT

Montana's limit on a defendant's use of voluntary intoxication represents a substantive decision about moral accountability, and its validity should be judged under substantive, not procedural, due process standards. By preventing voluntary intoxication from negating *mens rea*, the people of Montana have determined that voluntarily-intoxicated offenders are as morally culpable as their sober counterparts. This is a matter of substantive criminal law. As the plurality opinion in *Michael H.* v. *Gerald D.*, 491 U. S. 110 (1989) demonstrates, when substantive policies are phrased in evidentiary or procedural terms, such rules should be analyzed under substantive, not procedural, due process. Thus Montana's decision to create an alternative *mens rea* for crimes committed by intoxicated offenders should be analyzed under substantive due process.

Limits on the use of voluntary intoxication embody a strong social policy that satisfies substantive due process. There is a strong correlation between intoxication and crime, particularly violent crime. At least one factor explaining the relationship between intoxication and crime are expectations we derive from our culture. Because we believe that intoxicants make us more aggressive, we tend to act more aggressive when intoxicated.

Limits on the use of voluntary intoxication attempt to break this connection. An important part of the reason why some intoxicated people commit crimes is the belief that intoxication excuses criminal conduct. Withdrawing voluntary intoxication from the defendant's arsenal is an attempt to shatter this myth and reduce intoxication-related crime.

Since there is no fundamental right to have one's intoxication reduce criminal culpability, Montana's statute is accorded deferential review under substantive due process. The importance of the underlying social policy and the close fit between the statute and the goal ensure that Montana's statute satisfies due process.

If procedural due process must be invoked, then *Patterson* v. *New York*, 432 U. S. 197 (1977) provides the proper standard. *Patterson* corrected *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975) by returning the reasonable doubt standard to its relatively undisruptive status first envisioned in *In re Winship*, 397 U. S. 358 (1970). Under *Patterson*, a state criminal rule that is historically valid, does not undermine the prosecution's burden of proving each element of the crime beyond a reasonable doubt, and has not been abused by the states, satisfies the reasonable doubt requirement.

This standard is not undermined by the Montana Supreme Court's interpretation of dicta in *Martin* v. *Ohio*, 480 U. S. 228 (1981). The decision below would entitle defendant to submit to the jury any evidence relevant to reasonable doubt, seriously disrupting the law of evidence. This is unintended by the *Martin* Court. This Court should disavow this extremism and reassert the preeminence of *Patterson*.

Montana's limit on voluntary intoxication satisfies *Patterson*. Banning the use of voluntary intoxication goes back to the common law. While there is some historical support for the

specific intent doctrine, this Court should not enshrine this confusing, illogical doctrine into the Due Process Clause. This limit also satisfies the second part of *Patterson*, as it leaves undisturbed the prosecution's duty to prove each element of the crime.

Nor is the Montana statute abusive. Its historical pedigree indicates that it is not an attempt to circumvent the reasonable doubt requirement. This conclusion is reinforced by the nature of the evidence being excluded. The instances of intoxication negating *mens rea* are either exceedingly rare or nonexistent. It is much more likely that admitting such evidence will confuse the jury by reinforcing myths about intoxication excusing crime. It is no abuse to exclude such highly prejudicial, minimally probative evidence.

Montana's statute also satisfies *Chambers* v. *Mississippi*, 410 U. S. 284 (1973) and *Rock* v. *Arkansas*, 483 U. S. 44 (1987). Chambers was very fact-specific and involved the denial of highly exculpatory evidence. *Rock* dealt with the arbitrary denial of defendant's right to testify on her own behalf. The strong substantive policy supporting Montana's ban on marginally relevant, prejudicial evidence is consistent with these two narrow decisions.

ARGUMENT

I. The Montana statute represents a substantive decision about moral accountability, and its validity should be judged under substantive, not procedural, due process standards.

"We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. *This process of adjustment has always been thought to be the province of*

the States." *Powell* v. *Texas*, 392 U. S. 514, 535-536 (1968) (plurality opinion of Marshall, J.) (emphasis added; footnote omitted).

In the present case, the people of Montana, through their Legislature, have made a decision about the moral culpability of persons who commit crimes while voluntarily intoxicated. "Egelhoff was not allowed to rebut such evidence [of *mens rea*] with evidence that his level of intoxication precluded him from forming the requisite mental state." *State* v. *Egelhoff*, 900 P. 2d 260, 265 (Mont. 1995). He was precluded because the people of Montana decided as a matter of *substantive* law that the fact he sought to prove does not make him any less blameworthy, does not negate guilt, and therefore is irrelevant.

The state court in the present case did not address whether the statute was procedural or substantive, and in any event the label attached by state law would not be determinative. See *Hicks* v. *Feiock*, 485 U. S. 624, 631 (1988); *id.*, at 646 (O'Connor, J., dissenting).[2]

The effect of intoxication on moral blameworthiness has a long and winding history, as is further described in part II, *post*, at 8-13. The people of Montana certainly possess the sovereign power to decide that a person who kills after drinking himself into such a state that he can neither know nor have purpose[3] is just as blameworthy and just as guilty as one who kills "purposely" or "knowingly." If that is what they did, then *In re Winship*, 397 U. S. 358 (1970) and its progeny are inapposite.

Legislatures sometimes phrase substantive rules in procedural or evidentiary terms. *Michael H.* v. *Gerald D.*, 491 U. S. 110

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2. In *Hicks*, like the present case, the government sought review from a state appellate decision in favor of the defendant. This Court vacated and remanded "for further consideration of [the statute] free from the compulsion of an erroneous view of federal law." *Id.*, at 640-641. If the superficiality of the state opinion in the present case prevents this Court from finally determining the case, the same course might be in order here.

3. There is considerable debate as to whether such a mental state is even possible in a person sufficiently conscious to commit the *actus reus*. See *post*, at 24-26.

(1989) is the best example. Former California Code of Civil Procedure section 621 provided that, with certain exceptions, "the issue of a wife cohabiting with her husband . . . is conclusively presumed to be a child of the marriage." *Id.*, at 117; see also Cal. Family Code § 7540 (same rule in new code).

The plurality disposed of the procedural due process claim in a page and a half. "While § 621 is phrased in terms of a presumption, that rule of evidence is the implementation of a substantive rule of law." 491 U. S., at 119. The state had decided, as a matter of policy, that in this situation the legal rights and duties of fatherhood should be vested in the husband, regardless of who was the genetic father of the child. "In this respect there is no difference between a rule which says that the marital husband shall be irrebuttably presumed to be the father, and a rule which says that the adulterous natural father shall not be recognized as the legal father." *Id.*, at 120.

The analogy to the present situation is exact. There is no difference between a rule which says that intoxication will not be considered to negate purposefulness and a rule which says that intoxicating oneself to the point of negating purposefulness is an alternate *mens rea* for committing the crime. This is not a case where the jury was instructed to ignore the exculpatory evidence in deciding whether the defendant was guilty of murder. Cf. *Gilmore* v. *Taylor*, 124 L. Ed. 2d 306, 318-319, 113 S. Ct. 2112, 2118 (1992). This is a case where the Legislature has made a moral judgment that the evidence is not exculpatory.

The California Supreme Court confronted a similar procedural/substantive distinction in *People* v. *Bransford*, 884 P. 2d 70 (1994). California Vehicle Code section 23152(b) prohibits driving with a blood alcohol concentration above 0.08 percent. To deal with the situation of drivers who take a breath test and not a blood test, the statute goes on to state that blood alcohol "shall be based upon" a fixed ratio of blood alcohol to breath alcohol. Defendants were not permitted to show that their personal "partition ratios" were different from the ratio stated in the statute. *Id.*, at 74. The Court rejected the constitutional challenge after finding that the statute changed the substantive definition of the crime. *Id.*, at 73-74.

A single crime which can be committed in different ways is not unusual in the criminal law. During the nineteenth century, a person charged with one of the crimes of larceny, embezzlement, or false pretenses could sometimes win an acquittal by arguing he was actually guilty of one of the others. See 2 W. LaFave & A. Scott, Substantive Criminal Law § 8.8, p. 409 (1986). This made no sense, because the distinctions between the crimes were often subtle or dependent on facts known only to the defendant, and the crimes are equally blameworthy. *Id.*, at 409-412.

The answer to this problem was to consolidate the three crimes. *Id.*, at 414-415. In *People* v. *Nor Woods*, 233 P. 2d 897 (Cal. 1951), the defendant was charged under such a statute with fraud in the sale of a car. The jury did not need to agree whether the victim merely transferred possession, making the defendant guilty of larceny by trick, or actually passed title, making the crime false pretenses. It is sufficient that they agreed he is guilty of one or the other, without precisely marking the blurred and morally irrelevant boundary between them. *Id.*, at 89[illegible]; see also *Schad* v. *Arizona*, 501 U. S. 624, 630 (1991) (jury need not agree on felony murder versus premeditated murder).

In *Nor Woods*, consolidation of the theft crimes effectively withdrew the question of title from the jury. The case is no different than if they were instructed that title "shall not be considered," as the Montana statute does with intoxication. A general verdict under such a statute is permissible. There is no general constitutional requirement of separate verdicts on each possible mode of committing a crime. See *Schad*, 501 U. S., at 631 (plurality). The only limit is whether offenses have been joined which are so disparate as to violate the vagueness doctrine, *id.*, at 632-633, a standard this statute easily passes.

Thus, the practical effect which the Montana Legislature sought to achieve is one within its power to enact. The principal question is whether the words chosen by the Legislature operate to invalidate the means, even though the end is permissible.

Regrettably, this Court's cases on form versus substance have not been entirely consistent. *Hicks* v. *Feiock*, *supra*, 485 U. S., at 631, noted that "labels affixed" were not controlling and proceeded to examine "the substance of the pro-

ceeding . . . ." However, *Carella* v. *California*, 491 U. S. 263, 263-265, 267 (1989), decided the same day as *Michael H.*, *supra*, struck down a mandatory presumption regarding theft of rental cars without pausing to consider whether the Legislature had actually created a new variant of theft through inartful language.

Just as the important protections of the Due Process Clause cannot be deprived merely by the label attached to a proceeding, see *Hicks* v. *Feiock*, 485 U. S., at 631; *In re Gault*, 387 U. S. 1, 30-31 (1967), neither should the awesome power of judicial review of statutes be invoked merely because a legislature failed to express its permissible objective in precisely the right words. The Montana Legislature has decided that Egelhoff's conduct is equally culpable whether his claim to have been too intoxicated to form the otherwise required mental state is true or not. That decision is within its authority to make.

II. Limits on defendant's use of voluntary intoxication embody a strong social policy that satisfies substantive due process.

Substantive due process is necessarily narrow. The Due Process Clause "has at times been a treacherous field for this Court" which gives "reason for concern lest the only limits . . . to judicial intervention become the predilections of those who happen at the time to be the members of this Court." *Moore* v. *East Cleveland*, 431 U. S. 494, 502 (1977). Unless the legislation impinges upon a fundamental right, substantive due process review of legislation is very deferential. Substantive due process review of social and economic legislation gives great deference to legislatures. See, *e.g.*, *City of New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976); 2 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 15.4, p. 407 (2d ed. 1992). The policy supporting limits on the use of voluntary intoxication will demonstrate that such statutes are entitled to and will satisfy this deferential standard.

There is a close, disturbing, and incompletely defined relationship between intoxication and crime. Many studies have noted that a disproportionally large number of crimes, particularly violent crimes, are committed by intoxicated offenders. See, *e.g.*, Murdoch, Pihl, & Ross, Alcohol and Crimes of Violence: Present Issues, 25 Int'l J. of the Addictions 1065, 1066-1067 (1990); Fagan, Intoxication and Aggression, in Drugs and Crime 241-243 (M. Tonry and J. Wilson ed. 1990) ("Fagan"); Spunt, *et al.*, Alcohol and Homicide: Interviews with Prison Inmates, 24 J. of Drug Issues 143, 143-144 (1994). It was once thought that this close association was brought about by the fact that the chemical effect of intoxicants was to make people uninhibited. See Critchlow, The Powers of John Barleycorn, 41 American Psychologist 751, 753 (July 1986). This belief helped create and sustain the notion that crimes committed under voluntary intoxication could somehow be less culpable. Thus, intoxication has been permitted to negate *mens rea* in at least specific intent crimes. See Mitchell, The Intoxicated Offender—Refuting the Legal and Medical Myths, 11 Int'l J. Law and Psych. 77, 78-83 (1988).[4] This stood in marked contrast to the common law view, which held that voluntary intoxication aggravated criminal conduct. See 4 W. Blackstone, Commentaries 25-26 (1st ed. 1769).

The belief that intoxicants are related to crime solely because they act as chemical disinhibitors is deeply ingrained in American culture. See Critchlow, *supra*, 41 American Psychologist, at 753-754; Mitchell, *supra*, 11 Int'l J. Law and Psych., at 82-83; Murdoch, *supra*, 25 Int'l J. of the Addictions, at 1066. It has also come under strong attack. It is very difficult to study the biological effect of intoxicants on human behavior, because we still have little understanding of how intoxication causes drunkenness and most of the research is conducted on mildly intoxicated university students under only mildly stressful

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4. Much of the research on the effects of intoxication and crime deals with alcohol. While many other substances intoxicate, see Special Project, Drugs and Criminal Responsibility, 33 Vand. L. Rev. 1145, 1145-1171 (1980), researchers often do not distinguish between various intoxicants. See, *e.g.*, Fagan, *supra*, at 241-243 (listing research on both drugs and alcohol then noting the link between "intoxication and aggression"). Given the deference courts give to the wisdom of substantive legislative decisions, see *Dukes*, *supra*, 427 U. S., at 303, there is no need to make distinctions finer than those made by the experts. Therefore, research on alcohol and drugs can be used interchangeably.

situations. *Fagan*, *supra*, at 248-249. Under controlled studies, people who were given a placebo and told it was alcohol acted as aggressively as those who were given alcohol and knew they were consuming it, contradicting the notion that intoxication has some inevitably biochemical link to aggressive behavior. See Collins, Suggested Explanatory Frameworks to Clarify the Alcohol Use/Violence Relationship, 15 Contemp. Drug Prob. 107, 115 (1988); see also Critchlow, *supra*, 41 American Psychologist, at 754-755 (placebo studies demonstrate expectations determine intoxicated behavior).

Culturally based expectations can provide a useful tool in explaining intoxication-related crime. Society's views on the effects of intoxication can have a real effect on the aggressiveness of the intoxicated. Thus one researcher found that while two Central Mexican Indian tribes engaged in heavy drinking, drinking was only associated with violence in one tribe. These differences were attributed "to the cultural norms that govern drinking behavior, *including the accountability under tribal rules of individuals for their behavior after drinking*." U. S. Dept. of Justice, National Institute of Justice, Alcohol Use and Criminal Behavior 14-15 (1981) ("NIJ") (emphasis added).

This conclusion is consistent with the placebo studies. People became more aggressive after drinking the placebo because society instructed them that alcohol made them more disinhibited and therefore more aggressive. See Collins, *supra*, 15 Contemp. Drug Prob., at 115. Similarly, many researchers now believe that cultural norms about induced intoxication are the primary influence on the behavior produced by intoxicants. See Mitchell, *supra*, 11 Int'l J. of Law & Psychiatry, at 86-87; NIJ, *supra*, at 14-15; Critchlow, *supra*, 41 American Psychologist, at 760-761.

It is unlikely that we will ever define the relationship between intoxication and crime with complete precision. Thus there is still some support for the adherents of a primarily pharmacological explanation for intoxication-related aggression. See Chermack and Taylor, Alcohol and Human Physical Aggression: Pharmacological Versus Expectancy Effects, 56 J. Stud. Alcohol 449 (1995). The best explanation is found from a synthesis of the two views. Thus pharmacology and expectations can both play a role in explaining intoxication-related

crime. See Lang, Alcohol-Related Violence: Psychological Perspectives, in Alcohol and Interpersonal Violence: Fostering Multidisciplinary Perspectives 136 (S. Martin ed. 1993).

The Due Process Clause does not require Montana to choose between these two explanations. "As federal judges, we have no authority to pass judgment on the wisdom of the underlying policy determination." *Martinez* v. *California*, 444 U. S. 277, 283 (1980). "But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of public welfare . . . ." *Day-Brite Lighting* v. *Missouri*, 342 U. S. 421, 423 (1952). Judicial deference extends to the states' legislative prerogative in the criminal law. See *Patterson* v. *New York*, 432 U. S. 197, 201 (1977). Montana should be allowed to attack the expectation-based causes of intoxicated crime without judicial interference.

An important factor behind the relationship between expectations, intoxication, and crime is the use of intoxication by criminals as an excuse for their behavior. It is well known that criminals attempt to excuse their behavior to society and to themselves by blaming their intoxication. See Collins, *supra*, 15 Contemp. Drug Prob., at 116; see also Spunt, *supra*, 24 J. of Drug Issues, at 149-150; Critchlow, *supra*, 41 American Psychologist, at 754; Fagan, *supra*, at 295-296 (placebo studies showing how expectations influence intoxicated behavior). Rapists and child molesters may even preplan their "extenuating" circumstances. McCord, Considerations of Causes in Alcohol-Related Violence, in Alcohol and Interpersonal Violence, *supra*, at 72. By removing blame for crime from the intoxicated offender, cultural attitudes can make intoxication more likely to lead to crime.

> "On a cultural level, it seems to be the negative consequences of alcohol that hold the most powerful sway over our thinking. Because alcohol is seen as a cause of negative behavior, alcohol-related norm violations are explained with reference to drinking rather than the individual. Thus, by believing that alcohol makes people act badly, we give it a great deal of power. *Drinking becomes a tool that legitimates irrationality and excuses violence without permanently destroying an individual's moral standing or the society's system of rules and ethics*. This power consists in our own

beliefs, and changing these beliefs is no easy task: They are strongly entrenched, enduring legacies from the temperance movement." Critchlow, *supra*, 41 American Psychologist, at 761-762 (citation omitted; emphasis added).

To the extent that expectations cause intoxication-related crime, then society should eliminate the intoxicated offender's excuses. "The plausibility of the disavowal framework depends on the acceptance of these accounts of behavior by society. Such accounts help avoid the assignment of an identity to an individual consistent with their deviant behavior." Fagan, *supra*, at 296 (citation omitted). Such excuses are not immutable. Society has changed its attitude towards intoxication from time to time. See Critchlow, *supra*, 41 American Psychologist, at 762.

Limits on the use of voluntary intoxication are a key component in breaking the link between intoxication, expectations, and crime. Criminal law plays an important role in educating us about proper and improper conduct. See Scheidegger, Capital Punishment in 1987: The Puzzle Nears Completion, 15 West. St. L. Rev. 95, 96 (1987); 1 W. LaFave & A. Scott, Substantive Criminal Law § 1.5(5), pp. 34-35 (1986). Limits on the use of voluntary intoxication can thus educate people that intoxicated crime is no longer accepted by society. Criminal law also expresses society's moral outrage at misconduct. See *Gregg* v. *Georgia*, 428 U. S. 153, 183 (1976) (lead opinion). Montana Code Annotated § 45-2-203 and similar statutes express society's moral outrage at intoxicated crimes. "Numerous trial decisions . . . demonstrate that intoxication permits offenders to shift some or all of the blame to their drugged state. Such decisions contribute to a general cultural climate *allowing intoxicated misbehavers to excuse themselves*." Mitchell, *supra*, 11 Int'l J. Law and Psych., at 87-88 (emphasis added). The decision below is another precedent in this line of cases.

There is no fundamental right to have one's voluntary intoxication reduce one's criminality. Section 45-2-203, by changing the *mens rea* of crimes, see Part I, *ante*, at 4-8, in order to reduce intoxication-related crime, infringes upon no other interest of defendants. Fundamental fairness, whatever it may be, is made of sterner stuff than this. History, an important determinant in any due process analysis, see, *e.g.*, *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31 (1922) (Holmes, J.); *Michael H.* v. *Gerald D.*, 491 U. S. 110, 122 (1989), is on the side of limiting the legal effect of intoxication. See 4 Blackstone, *supra*, at 26. This makes rational basis the appropriate level of scrutiny for limits on the use of voluntary intoxication.

Section 45-2-203 readily satisfies this test. Since it is an effort to prevent crime, it advances one of society's most important interests. See *Procunier* v. *Martinez*, 416 U. S. 396, 411 (1974), overruled on other grounds, *Thornburg* v. *Abbott*, 490 U. S. 401, 413-414 (1989). The substantial research on culture and crime and the criminal law's function as an influence on our culture make the relationship between section 45-2-203 and crime reduction more than rational. Since it is at the very least rationally related to a legitimate state interest, section 45-2-203 passes muster under substantive due process.

III. The Montana Supreme Court's interpretation of the *Martin* dicta does not govern the present case.

Even if the substantive due process arguments found in parts I and II are not dispositive, the Montana Supreme Court's decision still cannot stand. Its extreme interpretation of dicta in *Martin* v. *Ohio*, 480 U. S. 228 (1987) should be rejected.

"Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. R. Co.* v. *May*, 194 U. S. 267, 270 (1904). This principle applies with undiminished force to the constitutional protections of criminal defendants. "[G]eneral rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." *Mattox* v. *United States*, 156 U. S. 237, 243 (1895).

Patterson v. *New York*, 432 U. S. 197 (1977) contains the most illuminating analysis of the reasonable doubt requirement. It sticks closest to the uncontroversial nature of this requirement

as stated in *In re Winship*, 397 U. S. 35 (1970) and therefore should govern the present case.

A. Winship.

The difficulties with the reasonable doubt standard do not stem from *In re Winship*, 397 U. S. 358 (1970). For the most part, *Winship* simply stated the obvious. Reasonable doubt was almost universally accepted in this country as the standard of proof for criminal cases. See *id.*, at 361; 9 J. Wigmore, Evidence § 2497, pp. 405-406 (Chadbourn rev. 1981). In addition to noting this point, the *Winship* Court also explained why the reasonable doubt standard was important. Since a criminal defendant has much more at stake in the trial than the prosecution, common sense makes the state bear the risk of erroneous verdicts. See 397 U. S., at 363. Like the reasonable doubt standard itself, this rationale for the standard is similarly uncontroversial, dating back to the common law. See 4 W. Blackstone, Commentaries 352 (1st ed. 1769).[5] The *Winship* Court concluded its justification of applying reasonable doubt to the states by noting the entirely logical point that this standard helps "command the respect of the community in applications of the criminal law." 397 U. S., at 364. By taking all reasonable efforts to ensure that only the guilty are convicted, the criminal law retains its "moral force." See *ibid.*

The only controversy in *Winship* was not with the reasonable doubt standard itself, but with whether it applied to juvenile delinquency proceedings. When *Winship* was decided, many jurisdictions did not use the reasonable doubt standard in juvenile proceedings. See *id.*, at 360, n. 3. This part of *Winship* is irrelevant to the present case, except as an example of how uncontroversial *Winship* appeared to be for the criminal law. Because the reasonable doubt standard was so well established in the criminal law, the question of whether it was constitutionally required had not arisen in a criminal case. Only the use of a different standard in juvenile cases brought the question up.

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5. "[F]or the law holds, that it is better that ten guilty persons escape, than that one innocent suffer."

This history would seem to indicate that *Winship* would leave the criminal law undisturbed.

B. Mullaney.

The expectation that *Winship* would not disrupt the criminal law was seemingly upset by *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975). *Mullaney* held that this common law presumption of malice, where an intentional, unjustified, unexcused homicide was presumed to be murder unless defendant showed adequate provocation, see *id.*, at 693-694, violated *Winship*. Maine attempted to avoid *Winship* by noting that under Maine law, the absence of provocation was not necessary to constitute the crime of murder. See *id.*, at 696-697. This Court refused to accept this contention, finding that the consequences of mitigating murder to manslaughter were so great that they warranted protection under *Winship*. See *id.*, at 697-698.

The *Mullaney* Court appeared to be driven by a fear that states could circumvent the reasonable doubt standard by manipulating the structure of their criminal law. "Thus if petitioners' argument were accepted, Maine could impose a life sentence for any felonious homicide—even one that traditionally might be considered involuntary manslaughter—unless the *defendant* was able to prove that his act was neither intentional nor criminally reckless." *Id.*, at 699 (emphasis in original).

The problem with this fear is that it is essentially unfounded, and almost impossible to allay. *Winship* demonstrated that the states had long accepted the reasonable doubt standard. This concern that the same states which helped advance the reasonable doubt standard to a pillar of fundamental fairness would now attempt to avoid it by perverting their criminal law is unseemly.

More importantly, a concerted effort by a state to avoid the result of *Mullaney* would be very difficult to stop. Maine simply could have abolished the crime of heat of passion manslaughter. Unless this Court took the extraordinary step of creating a constitutional right to the traditional degrees of homicide, such a statutory scheme would satisfy both *Mullaney* and *Winship*. This attempt to close every loophole, no matter how remote, betrays an inappropriate mistrust of state legislatures. The

Mullaney Court seemed to presume that the states would act in bad faith.

C. Patterson.

Patterson v. *New York*, 432 U. S. 197 (1977) corrected *Mullaney*. The *Patterson* Court allowed New York to place the burden of proving the affirmative defense of extreme emotional disturbance on the defendant. By showing a much greater willingness to trust the states, the *Patterson* Court backed away from much of *Mullaney*.

> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine* v. *California*, 347 U. S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Id.*, at 201-202 (quoting *Speiser* v. *Randall*, 357 U. S. 513, 523 (1958)).

As in *Mullaney*, *Patterson* involved a finding that reduced murder to manslaughter. See *id.*, at 198-199; *Mullaney* v. *Wilbur*, 421 U. S. 684, 693-694 (1975). This similarity was immaterial to the *Patterson* Court. Language in *Mullaney* that could be read to "require the prosecution to prove beyond reasonable doubt any fact affecting 'the degree of criminal culpability,' " *Patterson*, 432 U. S., at 214, n. 15, led down a slippery slope. Taken to its logical conclusion, such language could penalize legislatures for mitigating crimes unless they placed the burden of disproving the mitigation on the prosecution. See *id.*, at 215, n. 15. "The Court did not intend *Mullaney* to have such far-reaching effect." *Ibid.*

Mullaney had to be limited. It "surely held that a State must prove every ingredient of an offense beyond a reasonable doubt,

and it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense . . . .¶ It was unnecessary to go further in *Mullaney*." *Id.*, at 215; accord *McMillan* v. *Pennsylvania*, 477 U. S. 79, 85 (1986).

What is most illuminating about *Patterson* is how it dealt with concerns about legislative abuse. It recognized that its decision not to require the state to disprove all affirmative defenses beyond a reasonable doubt "may seem to permit state legislatures to reallocate burdens of proof by labelling as affirmative defenses at least some elements of the crimes now defined in their statutes." 432 U. S., at 210. How it dealt with this fear is what makes *Patterson* the most important of the reasonable doubt cases.

The *Patterson* Court recognized that any fear of state abuse of affirmative defenses was largely unfounded. History demonstrated that the states had not abused their privilege to place the burden of proving affirmative defenses on defendant. *Id.*, at 211. This conclusion is also consistent with common sense. Few government activities are as important as the law of crimes. It provides the means of deterring antisocial conduct, and of expressing society's condemnation of such destructive behavior. See *People* v. *Roberts*, 826 P. 2d 274, 298 (Cal. 1992). The law of crimes develops through an evolutionary process that is the traditional function of the states. See *Powell* v. *Texas*, 392 U. S. 514, 536 (1968) (plurality).

Therefore, instead of creating some far-reaching rule to deal with hypothetical threats, *Patterson* simply upheld New York's historically valid procedure because "nothing was presumed or implied against Patterson; and his conviction is not invalid under any of our prior cases." 432 U. S., at 216.

D. Martin.

Martin v. *Ohio*, 480 U. S. 228 (1987) was a relatively straightforward application of *Patterson*. As in *Patterson*, the crucial element of history was on the state's side; historically, defendants had the burden of proving self-defense. See *id.*, at 235; *Patterson*, *supra*, 432 U. S., at 202. This, along with the fact that under Ohio law the prosecution still had to prove each

element of the crime beyond a reasonable doubt, was dispositive. The fact that only one other state followed this practice was irrelevant; *Patterson* required no more than what Ohio provided. See *Martin*, *supra*, 480 U. S., at 236.

The problem with *Martin* is that the language of the opinion goes beyond the facts of the case. The *Martin* Court chose to deal with the hypothetical concern of a state preventing self-defense evidence from being admitted not as a defense, but as a means of creating reasonable doubt.

> "It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case, *i.e.*, that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard. Such instruction would relieve the State of its burden and plainly run afoul of *Winship*'s mandate." *Id.*, at 233-234.

This passage was unnecessary to the disposition of the case, because the Ohio statute did not effect the admissibility of self-defense evidence. Therefore, this passage is no more than dicta. See *St. Louis, V. & T. H. R. Co.* v. *Terre Haute & I. R. Co.*, 145 U. S. 393, 403 (1892). As dicta, this passage is not binding on this Court as *stare decisis*. See, *e.g.*, *Kokkonen* v. *Guardian Life Ins. Co. of America*, 128 L. Ed. 2d 391, 396, 114 S. Ct. 1673, 1676 (1994). This fact was understood by the Montana Supreme Court, which decided to follow this dicta even though it was not bound by it. See *State* v. *Egelhoff*, 900 P. 2d 260, 265-266 (1995).

As the present case demonstrates, the passage from *Martin* is not simply "mere dicta." It is also dangerous dicta. Montana's high court has taken the *Martin* dicta to its logical extreme. It transformed *Winship*'s guarantee that the prosecution must prove each element beyond a reasonable doubt into a general rule of evidence requiring the admission of *all* evidence relevant to raising reasonable doubt. See *id.*, at 266. This is a breathtaking assertion. Allowing defendants to submit *any* evidence to the jury that is relevant to reasonable doubt would decimate the law of evidence. Many rules of evidence exclude otherwise relevant evidence. See, *e.g.*, Fed. Rules Evid. 403

(undue prejudice); Rule 412 (rape victim's past sexual behavior); Rules 801-802 (hearsay). "Fundamental fairness" is neither this intrusive to the states, nor unfair to the prosecution.

This Court has wisely chosen to avoid constitutionalizing the rules of evidence. Thus, the Confrontation Clause, U. S. Const., Amdt. 6, is not a constitutional rule against all hearsay adverse to a defendant. See *Ohio* v. *Roberts*, 448 U. S. 56, 62-63 (1980). This Court rejected such an interpretation of the Confrontation Clause as too disruptive and contrary to the historical meaning of the Clause. See *id.*, at 63.

The *Martin* dicta does not require the conclusion reached by the Montana Supreme Court. *Martin* assumed that the self-defense evidence in Martin's case was already admissible. "The instructions in this case could be clearer in this respect, but when read as a whole, we think they are adequate to convey to the jury that *all of the evidence*, including the evidence going to self-defense, must be considered in deciding whether there was reasonable doubt about the sufficiency of the State's proof of the elements of the crime." *Martin*, *supra*, 480 U. S. 234 (emphasis added).

Just like the interpretation of the Confrontation Clause rejected by *Roberts*, the Montana Supreme Court's transformation of *Winship* from a guarantee of reasonable doubt should be rejected as extreme and ahistorical. As noted above, transforming *Winship* into a guarantee of admissibility would inevitably be immensely disruptive to the law of evidence. It would also be ahistorical. The common law rejected any notion that voluntary intoxication could reduce criminality, finding it to aggravate culpability. See 4 W. Blackstone, Commentaries 25-26 (1st ed. 1769). Voluntary intoxication was not allowed to reduce criminal responsibility until well into the nineteenth century, and then only for specific intent crimes. See *Hopt* v. *People*, 104 U. S. 631, 633 (1882); *Tucker* v. *United States*, 151 U. S. 164, 170 (1894) (voluntary intoxication cannot reduce wanton killings to voluntary manslaughter); *People* v. *Hood*, 462 P. 2d 370, 377 (Cal. 1969).

Limiting the lower court's extreme interpretation of *Martin* would parallel *Patterson*'s disapproval of similar uses of *Mullaney*. See 432 U. S., at 214, n. 15. The *Martin* Court was

only concerned about the possibility of applying the preponderance standard to already admissible evidence. The dictum should be limited to this concern and explicitly noted as having no precedential weight. Neither *Martin* nor the present case involves placing such a burden on admissible evidence. In *Martin*, the evidence was freely admissible, see 480 U. S., at 234, while in the present case evidence of intoxication is rendered irrelevant by the Montana statute's effective change of the *mens rea* for crimes. See Part I, *ante*, at 4-8. This is not the place to give the *Martin* dicta precedential effect. "This seems to us a topsy-turvy version of judicial restraint. It was, if anything, those dicta themselves—uninvited, unargued and unnecessary to the Court's holdings—which insulted that virtue; and we would add injury to insult by according them precedential effect." *Nursing Home Pension Fund* v. *Demisay*, 124 L. Ed. 2d 522, 533, n. 5, 113 S. Ct. 2252, 2259, n. 5 (1993).

Patterson provides the proper analytical framework. If a practice has historical support, does not diminish the standard of proof for the elements of a crime, and has not been abused by the states, then the practice satisfies due process. See *Patterson*, *supra*, 432 U. S., at 210, 215; *Martin*, *supra*, 480 U. S., at 233, 235; see also *Medina* v. *California*, 505 U. S. 437, 445 (1992) (adopting *Patterson* for procedural due process challenges to state criminal rules); *id.*, at 446 ("Based on our review of the historical treatment of the burden of proof in competency proceedings, the operation of the challenged rule, and our precedents" the rule in question does not violate *Patterson*). As Part IV will demonstrate, limits to the use of voluntary intoxication readily satisfy *Patterson*.

IV. Limits on defendant's use of voluntary intoxication satisfy *Patterson*.

Patterson v. *New York*, 432 U. S. 197 (1977), the appropriate mode of analyzing state laws under *In re Winship*, 397 U. S. 358 (1970), see Part III C, *ante*, at 16-17, looks to three factors in determining whether a state rule satisfies the Due Process Clause. A rule that was historically accepted, does not diminish the burden of proof on any element of the relevant crime, and has not been subject to abuse will satisfy due process. See *ante*,

at 20.[6] Limits on the use of voluntary intoxication satisfy all three of these conditions.

A. History.

As noted earlier, historically, the law has limited defendant's use of his own intoxication for exculpation. See *ante*, at 9. The only difficulty presented by the history of voluntary intoxication under the law is the development of the specific intent doctrine. Under the common law, voluntary intoxication was of no use to the defendant. It was either ignored or treated as aggravating culpability. See 4 W. Blackstone, Commentaries 25-26 (1st ed. 1769); Hall, Intoxication and Criminal Responsibility, 57 Harv. L. Rev. 1045, 1046-1047 (1944); Singh, History of the Defence of Drunkenness in English Criminal Law, 49 L. Q. Rev. 528, 530-535 (1933). During the course of the nineteenth century this view changed, as courts on both sides of the Atlantic developed a distinction between specific and general intent crimes. See, *e.g.*, *Hopt* v. *People*, 104 U. S. 631, 633 (1882); *Hall*, *supra*, 57 Harv. L. Rev., at 1048-1050; *People* v. *Hood*, 462 P. 2d 370, 377 (1969). This doctrine was meant to deal with the problem of the intoxicated offender by allowing voluntary intoxication to negate the mental element of so-called "specific intent" crimes. *Hood*, *supra*, 462 P. 2d, at 377-378. Specific intent remains the majority view in those many jurisdictions which choose to limit voluntary intoxication. See 2 C. Torcia, Wharton's Criminal Law § 111, pp. 81-115 (15th ed. 1994).

The Montana statute in the present case does not follow the specific intent doctrine, instead forbidding defendant's use of his own voluntary intoxication with respect to all crimes. See Mont. Code Ann. § 45-2-203. Since at least some of the roots of the specific intent doctrine set in before the adoption of the Four-

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6. This does not mean that these are the only rules that will satisfy *Winship*. Laws without historical pedigrees must also be allowed to withstand constitutional muster or the states may lose their role as the national laboratories. Cf. *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). Thus, a new procedure can satisfy due process if there is not a historical basis for deeming it fundamentally unfair. See *Medina* v. *California*, 505 U. S. 437, 446 (1992).

teenth Amendment, see, *e.g.*, Hall, *supra*, 57 Harv. L. Rev., at 1049; *People* v. *Belencia*, 21 Cal. 544, 546-547 (1863), it may be argued that only those limits on voluntary intoxication that follow the specific intent doctrine are historically valid.

This argument is dangerous, and should be rejected. The specific intent doctrine has come under a ceaseless barrage of criticism as illogical and unworkable. See, *e.g.*, Morse, Undiminished Confusion in Diminished Capacity, 75 J. Crim. L. & Criminology 1, 4, n. 12 (1984); G. Williams, Criminal Law—The General Part § 21, p. 49 (2d ed. 1961); J. Hall, General Principles of Criminal Law 142 (2d ed. 1960); 1 W. LaFave & A. Scott, Substantive Criminal Law § 4.10, p. 554 (1986).

> "Too often the characterization of a particular crime as one of specific or general intent is determined solely by the presence or absence of words describing psychological phenomena—'intent' or 'malice,' for example—in the statutory language defining the crime. When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent. *There is no real difference, however, only a linguistic one*, between an intent to do an act already performed and an intent to do that same act in the future." *Hood*, *supra*, 462 P. 2d, at 377-378 (emphasis added).

The Due Process Clause cannot rest on such an ephemeral distinction. A constitutional specific intent doctrine would require the courts to make a case-by-case analysis of individual criminal statutes under this abstruse doctrine. "Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 120 L. Ed. 2d 674, 693, 112 S. Ct. 2791, 2803 (1992) (lead opinion). There is no reason to subject this Court or the state courts to such a frustratingly inexact doctrine. Therefore, this Court should accept the common law's total rejection of voluntary intoxication as an historically accepted practice. Since section 45-2-203 follows

the common law view of voluntary intoxication, it satisfies *Patterson*'s historical requirement.

B. Reasonable Doubt.

The second requirement of *Patterson* v. *New York*, 432 U. S. 197 (1977), that the relevant rule does not lessen the prosecution's burden of proving beyond a reasonable doubt each element of the crime, is taken from *In re Winship*, 397 U. S. 358 (1970). See 432 U. S., at 206. This is not the general right to submit relevant evidence that the Montana Supreme Court created out of the *Martin* v. *Ohio*, 480 U. S. 228 (1987) dicta. See *ante*, at 18-19. *Patterson* simply requires that the jury be instructed that the prosecution must prove beyond a reasonable doubt each element of the crime, see 432 U. S., at 206, and no presumption or implication can relieve the People of its burden. See *id.*, at 216. Thus the state legislature's definition of the elements of the crime is usually dispositive under *Patterson*. *McMillan* v. *Pennsylvania*, 477 U. S. 79, 85 (1986).

Limits on voluntary intoxication satisfy both aspects of *Patterson*. Montana Code Annotated § 45-2-203 did not prevent the jury from being instructed on the People's burden of proof for each element. See *State* v. *Egelhoff*, 900 P. 2d 260, 264 (Mont. 1995). There are many rules that prevent a criminal defendant from submitting relevant evidence to the jury. See *ante*, at 18-19. Preventing the admission of voluntary intoxication to negate *mens rea* "merely prohibits the jury from considering self-induced intoxication to negate the defendant's state of mind. Appellant could still have attempted to convince the jury he did not [have the required mental state]. Moreover, the statute [preventing the use of voluntary intoxication] does not relieve the State of the burden of establishing that a defendant had the requisite mens rea." *State* v. *Souza*, 813 P. 2d 1384, 1386 (Haw. 1991).

Nor do such laws create any impermissible presumptions. *Patterson* is concerned with presumptions that shift the state's burden of proof by presuming the existence of an element of the crime after the state proves the existence of the other elements. 432 U. S., at 215. Limits on the use of intoxication are simply irrelevant to this inquiry. The fact that defendant cannot submit some evidence simply does not presume the existence of an

element of a crime. This common sense conclusion is all that is required to satisfy *Patterson*'s second hurdle.

C. Abuse.

The concern in *Patterson* v. *New York*, 432 U. S. 197, 210 (1977) about abusive state efforts to circumvent the reasonable doubt requirement is satisfied in two ways. First, as in *Patterson*, there is no history of state abuse of limits on the use of voluntary intoxication. See *id.*, at 211.

The age of the rule helps demonstrate that it has not been abused. The limits on voluntary intoxication have been in effect in common law jurisdictions since the sixteenth century. See Singh, History of the Defence of Drunkenness in English Criminal Law, 49 L. Q. Rev. 528, 530 (1933). Its 400-year pedigree and widespread use, see *ante*, at 21, are strong evidence that this policy is not abusive.

The strong policy considerations behind limits on voluntary intoxication further show that it is not abusive. Such policies do not simply hamper defendants; they are meant to achieve the essential task of severing the link between intoxication and crime by eliminating our culture's acceptance of voluntary intoxication as an excuse for criminal behavior. See part II, *ante*. This is not some effort to craft legislation in order to wag the tail of the dog of avoiding the reasonable doubt requirement. See *McMillan* v. *Pennsylvania*, 477 U. S. 79, 88 (1986).

These limits are rendered even more appropriate by the minimal relevance of voluntary intoxication to negating *mens rea*.

> "Alcohol may loosen behavioral controls through a variety of biologically-induced psychological mechanisms, but intoxicated persons still know what they are doing and intend to do what they do. *They might not have committed the same acts if they had been sober, but they still intended to do what they did when intoxicated.* One who is sympathetic to intoxicated actors may wish to consider them less culpable in the partial responsibility sense because they have lessened controls, but intoxicated actors typically will not be less culpable because they lack *mens rea*." Morse, Undiminished Confusion in Diminished Capacity, 75 J. Crim. L. & Criminology 1, 45 (1984) (emphasis added); see also Mitchell, The Intoxicated Offender—Refuting the Legal Myths, 11 Int'l J. Law and Psych. 77, 90-91 (1988).

Legal commentators have also noted the rarity of intoxication negating *mens rea*. "Rather obviously, harms committed by inebriates reveal not wild, disorganized, aimless, motor activity but conduct well adapted to attain specific goals." Hall, Intoxication and Criminal Responsibility, 57 Harv. L. Rev. 1045, 1053-1054 (1944). When defendants succeed in negating specific intent through voluntary intoxication "it is commonplace that in most of these cases a criminal intent is present . . . ." *Id.*, at 1062. As one noted jurist understood, "[d]runkenness, while efficient to reduce or remove *inhibitions*, does not readily negate intent." *Heideman* v. *United States*, 259 F. 2d 943, 946 (D. C. Cir. 1958) (emphasis in original; footnote omitted) (Burger, J.).

The present case provides an excellent example that most claims that intoxication negates *mens rea* are specious. There was ample evidence that defendant had the appropriate *mens rea* in spite of his intoxication.

> "In order to commit the crimes, he had to take the gun from the glove compartment of the vehicle. He made an attempt to flee after he went into the ditch. He tried to avoid detection when Rebecca Garrison tried to approach the car. Ms. Garrison noticed a stick which she assumed must have been used by Egelhoff to depress the accelerator so that Egelhoff could drive from the back seat. He could talk. At the IGA store at 9:20 p.m., Egelhoff spoke well and did not slur his words. He later told Ms. Garrison to "stay away" and he talked to the ambulance driver. He had physical energy and strength. He tried to avoid detection by another of the witnesses who had stopped to give assistance. Detective Bernall testified that his coordination was good as was demonstrated by his kicking of the camera." *People* v. *Egelhoff*, 900 P. 2d 260, 265 (Mont. 1995).

The fact that defendant claimed he had no memory of his actions, see *id.*, at 262-263, is irrelevant to his *mens rea* when he committed his crimes.

> "It is perfectly commonplace that persons may be well aware of what they are doing at a given time but are unable to remember what happened afterwards, especially if the events were highly upsetting. A later memory problem may indicate that a person has problems with alcohol, but it does not necessarily mean that he lacked various mental abilities or did not form certain mental states at the time in question." Morse, *supra*, 75 J. Crim. L. & Criminology, at 47; see also Mitchell, *supra*, 11 Int'l J. Law and Psych., at 91-92.

Public misconceptions about the ability of intoxication to excuse criminal behavior, see Critchlow, The Powers of John Barleycorn, 41 American Psychologist 751, 753-754 (1986), can make juries give this minimally relevant evidence much more probative value than it deserves. It is no abuse for the government to prevent the admission of evidence when its probative value is outweighed by its prejudicial effect. See Fed. Rules Evid., Rule 403. The fact that this benefits the prosecution instead of the defense does not offend due process. "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934). Montana's attempt to make this world safe and its criminal trials fairer and more accurate is no abuse of its prerogative to deal with crime. See *Patterson*, *supra*, 432 U. S., at 201-202.

V. Limits on voluntary intoxication do not violate any legitimate right to present evidence.

Some state limits on defendant's evidence can be unconstitutional. Under *Rock* v. *Arkansas*, 483 U. S. 44 (1987) and *Chambers* v. *Mississippi*, 410 U. S. 284 (1973), defendants have a carefully circumscribed right to present evidence. This right is much narrower than the general right to present evidence relevant to reasonable doubt invented by the court below, and is not violated by limits on the use of voluntary intoxication.

Chambers was a very reasonable response to a very unreasonable situation. Chambers was convicted of shooting and killing a police officer, Aaron Liberty, during a melee between

a small mob and a group of police officers trying to effect an arrest. See 410 U. S., at 285-286. Another man, McDonald, subsequently confessed to Chambers' attorneys that he had killed Officer Liberty. *Id.*, at 287. Later, McDonald repudiated his confession. *Id.*, at 288.

Part of Chambers' defense was that McDonald had committed the killing, but he could not present any evidence that McDonald confessed on four separate occasions. See *id.*, at 289. Chambers could not cross-examine McDonald about his confession because Mississippi followed the common law rule that a party could not impeach his own witness.[7] *Id.*, at 295. Chambers was defeated in his attempt to bring in the testimony of three people to whom McDonald confessed on the grounds that they were hearsay. *Id.*, at 298.

While the Court found the illogical and heavily criticized voucher rule to violate defendant's confrontation rights, it did not reverse the conviction on the voucher rule alone. See *id.*, at 295-298. Mississippi's use of the hearsay rule, when combined with the confrontation violation, mandated reversal.

While Mississippi admitted hearsay statements made against pecuniary interest, it did not admit statements made against penal interest like McDonald's confessions. *Id.*, at 299. The *Chambers* Court did not categorically forbid state hearsay rules from excluding exculpatory third-party confessions. See *id.*, at 300. Instead, *Chambers* relied on the fact that "[t]he hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." *Id.*, at 300. The indicia of reliability were both numerous and strong. Three confessions were made. They were made spontaneously to close acquaintances soon after the shooting. They were decidedly against McDonald's self-interest, and, finally, McDonald was present for cross-examination. See *id.*, at 300-301. This unique combination violated Chambers' right to present evidence on his behalf.

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7. Chambers' motion to call McDonald and examine him as an adverse witness was denied by the trial court. See *id.*, at 291-292.

The strength of Chambers' fact-specific claim demonstrates that this right is very limited. "In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.*, at 302. Exceptions to the hearsay rule admitting inherently trustworthy evidence were long accepted and defendant's evidence "was well within this rationale." *Ibid.* Furthermore, "[t]hat testimony also was *critical* to Chambers' defense." *Ibid.* (emphasis added). Therefore, "[i]n *these circumstances*, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied *mechanistically* to defeat the ends of justice." *Ibid.* (emphasis added).

Limits on voluntary intoxication are far removed from this narrow, idiosyncratic holding. There is no strongly reliable confession of a third party in the present case. Voluntary intoxication is at best marginally relevant to reasonable doubt as it rarely, if ever, negates *mens rea* in a defendant who committed the necessary *actus reus*. See *ante*, at 25-26. More importantly, this is not the *mechanistic* application of a rule of evidence. Limits on voluntary intoxication as a defense embody a strong, well-designed social policy intended to reduce crime. See Part II, *ante*.

Chambers "establish[ed] no new principles of constitutional law." *Id.*, at 302. It did nothing to diminish "the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." *Id.*, at 302-303. Instead, "we quite simply hold that under the *facts and circumstances of this case* the rulings of the trial court deprived Chambers of a fair trial." *Ibid.* (emphasis added). This cannot invalidate the important social policy and very different circumstances found in the present case to the common law.

Rock v. *Arkansas*, *supra*, is as readily distinguished. The *Rock* Court dealt with a "*per se* rule excluding a criminal defendant's hypnotically refreshed testimony." 483 U. S., at 49. Defendant's claim was based on her right to testify of her own behalf. The *Rock* Court drew this right from several constitutional provisions, see *id.*, at 51, and its own decisions, including

Chambers. See *id.*, at 55. It concluded that "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." *Id.*, at 55-56.

The present case is most easily distinguished from *Rock* because it does not involve defendant's testimony. Rock was convicted of manslaughter, see *id.*, at 48, a crime for which there will often be few witnesses. Preventing defendant from testifying will thus often devastate the defense. See *id.*, at 57. As noted above, voluntary intoxication is at most minimally relevant, see *ante*, at 24-26, and does not involve the testimony of the accused.

Rock applied a balance of interests test to limits on defendant's testimony. See *id.*, at 56. Applying interest-related balancing tests to state criminal rules and procedures is normally disfavored. See *Medina* v. *California*, 505 U. S. 437, 443 (1992). *Rock* should thus not be loosed upon all the rules of evidence, but instead limited to protecting defendant's own testimony.

Even if *Rock* exceeds these bounds, it still does not invalidate limits on voluntary intoxication. There is nothing "arbitrary" about limiting voluntary intoxication. It is part of a well-justified, important, social policy. As it at best minimally infringes upon the legitimate interests of defendant, the balance of interests are not unconstitutionally disproportionate.

Rock involved testimony that, while controversial, was at least subject to many safeguards. See 483 U. S., at 60-61. Voluntary intoxication, on the other hand, is likely to confuse the jury by reinforcing widespread, but inaccurate, beliefs regarding the ability of intoxication to negate *mens rea*. See *ante*, at 8-10. There are no safeguards here. Instead, negating defendant's *mens rea* through intoxication calls forth some of the worst examples of abusive expert testimony. See Mitchell, The Intoxicated Offender—Refuting the Legal and Medical Myths, 11 Int'l J. Law and Psych. 77, 100-103 (1988); Morse, Undiminished Confusion in Diminished Capacity, 75 J. Crim. L. & Criminology 1, 47-48 (1984). Whatever it is, *Rock* is no license for defendant to confuse the jury with inaccurate, irrelevant evidence.

CONCLUSION

The decision of the Montana Supreme Court should be reversed.

January, 1996

Respectfully submitted,

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(4)

No. 95-566

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF MONTANA,

Petitioner,

v.

JAMES ALLEN EGELHOFF,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Montana

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN ALLIANCE FOR RIGHTS AND RESPONSIBILITIES AND THE NEW YORK CHAPTER OF PARENTS OF MURDERED CHILDREN AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Pursuant to Rule 36.1 of the Rules of this Court, amici curiae American Alliance for Rights and Responsibilities ("AARR") and the New York Chapter of Parents of Murdered Children ("POMC"), respectfully move for leave to file the accompanying brief as amici curiae in support of petitioner. Petitioner has consented to the filing of the brief; however, counsel for Respondent has denied consent.

INTEREST OF THE AMICI CURIAE

AARR is a national nonprofit organization founded to foster civic and community life and to promote individual responsibility. The fundamental basis of individual

responsibility is accountability for the consequences of one's own conduct. Consequently, the AARR has a substantial interest in and a unique perspective regarding issues of personal accountability, particularly when they involve the use of intoxicants in a manner that endangers the public.

The AARR has been actively involved in efforts to deter and prevent irresponsible uses of drugs and alcohol. The AARR, for example, has had extensive experience assisting community groups in closing down local drug hubs and eradicating open-air drug markets. It has provided legal and technical assistance to public housing tenants and managers in combating drug markets and other street-level problems and has conducted training sessions for anti-crime and tenant groups.

The AARR has also promoted and defended a variety of measures designed to improve the quality of urban life, to promote safe public spaces, and to foster individual accountability. For instance, the AARR helped draft anti-aggressive-solicitation measures that are currently in place in Washington, Baltimore, Berkeley, Cincinnati, Santa Cruz, and Long Beach. The AARR has defended similar ordinances in court and has published numerous articles and opinions-editorials appearing in major newspapers on the subject. The AARR has also defended drug-related evictions, security searches in public housing, and regulations on urban camping.

Throughout its efforts, AARR has been guided by the principle that individuals should take charge of their lives and be held responsible for their behavior. Consistent with that belief, the organization has supported efforts designed to create and maintain an urban environment where residents and visitors are safe, businesses can thrive, and individuals can realize their full potential.

POMC is a local chapter of a national organization formed to provide support for the surviving families of

murder victims. It supports public policies that help to protect families and children from violence.

Amici perceive a danger in the message sent by the Montana Supreme Court's decision in this case; namely, that a person who engages in antisocial, violent and even deadly conduct may rely on his self-induced intoxication to excuse or diminish his responsibility for that conduct. That message is an anathema to amici, who instead believe that the criminal law should be used to emphasize personal responsibility, deter antisocial conduct, and protect innocent victims from the harms caused by others.

Amici are further concerned about the broader legal implications of this case. Like Montana, other States have attempted to limit the use of evidence of voluntary intoxication in determining criminal culpability. Amici support these efforts because, in our view, such rules tend to prevent individuals from avoiding responsibility for the consequences of their actions, which results in a safer society overall. If this Court were to affirm the Montana Supreme Court's judgment, however, the constitutionality of analogous laws could be called into question, and States might be deterred from enacting similar provisions. That result would hamper AARR's efforts to foster notions of personal accountability in the criminal law.

For the foregoing reasons, the motion of AARR and POMC to file the accompanying brief as amici curiae in support of Petitioner should be granted.

Respectfully submitted.

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INTEREST OF THE AMICI CURIAE

The interest of the amici curiae is described in the preceding motion for leave to file this brief.

SUMMARY OF ARGUMENT

The Montana legislature has decided that those who commit crimes while voluntarily intoxicated should be punished the same as those who commit crimes while sober. There is substantial justification for such a rule: the harm to society is the same regardless of whether the miscreants are sober or drunk, holding individuals responsible for the consequences of their conduct may deter them from becoming excessively inebriated and injuring others, and there is a high

correlation between alcohol abuse (as well as other drug abuse) and criminal behavior. Most important for the purposes of this case, this decision is well within the authority left to the States under the United States Constitution.

In our federal system, state legislatures have extensive authority to decide which conduct to condemn as "criminal." This authority is especially broad when the behavior to be sanctioned is harmful to society, and the actor is morally blameworthy when judged by contemporary community standards. Both are true of crimes committed by voluntarily inebriated individuals. The grossly intoxicated are dangerous because they reduce their capacity for taking dangers into account and for exercising self-restraint. Moreover, our society has long viewed voluntary intoxication as a vice, and throughout our history public drunkenness has been a crime.

As a matter of public policy, therefore, the Montana legislature enacted Montana Code § 45-2-203 to prevent evidence of self-induced intoxication from being considered to negate a finding that a defendant acted with the requisite criminal intent. By so doing, the legislature merely abandoned a rule that evolved in some States during the middle to late nineteenth century providing that such evidence *could* be offered for that purpose. At that time, evidence of voluntary intoxication was permitted only in cases involving crimes requiring proof of "specific" intent, even though the evidence might be equally relevant to many crimes requiring "general" intent. This illogical dichotomy developed because the rule was not firmly grounded on fundamental notions of criminality, but rather evolved as an expedient method by which to implement a policy judgment that held sway in the latter half of the nineteenth century: that those who commit crimes while intoxicated should be punished less severely than those who commit crimes sober. Not all agreed, however, and the rule was not, and still has not been, universally adopted among the States.

Indeed, the tide of public opinion has apparently turned, as evinced by the fact that some States, like Montana, are revisiting old notions about the appropriate punishment for those who intentionally use drugs (including alcohol), dull their senses, and harm others. It also reflects a growing political consensus underscoring the public importance of encouraging individual citizens to assume greater accountability for their conduct. The Montana legislature thus decided as a matter of policy that it no longer wanted to distinguish those who kill with purpose or knowledge while sober from those whose only defense to "purposeful" and "knowing" murder would be their voluntary intoxication. Although legal philosophers might differ as to the relative moral culpability of the sober and the intoxicated criminal, this Court has indicated that the extent to which blameworthy conduct should be punished, short of the death penalty, is a matter of legislative discretion. Thus, § 45-2-203 is not unconstitutional, regardless of whether it is viewed as a substantive change to Montana's criminal law or as a new rule of evidence.

ARGUMENT

By enacting § 45-2-203, Montana sought to amend its criminal law in light of contemporary values, as perceived by its elected legislators. In particular, Montana decided to hold its citizens fully responsible for otherwise criminal conduct, regardless of whether they act while sober or intoxicated. Nothing in the United States Constitution prevents a State from treating voluntary intoxication as supplying the element of moral culpability that justifies holding a person criminally responsible for the consequences of his injurious actions. The State had ample constitutional authority to implement that policy, whether the statute is viewed as amending the elements of Montana's substantive criminal law or as merely defining the type of evidence considered legally acceptable. In fact, not long ago this Court again "emphasized the preeminent role of the States in preventing and dealing with

crime and the reluctance of the Court to disturb a State's decision with respect to the definition of criminal conduct and the procedures by which the criminal laws are to be enforced in the courts." *Martin* v. *Ohio*, 480 U.S. 228, 232 (1986).

I. THE DUE PROCESS CLAUSE DOES NOT RESTRICT A STATE LEGISLATURE'S AUTHORITY TO DEFINE A CRIME, INCLUDING HOMICIDE, IN A MANNER THAT MAKES EVIDENCE OF VOLUNTARY INTOXICATION IRRELEVANT.

A. Section 45-2-203 Redefines the Mens Rea Element of Crimes in Which the Accused Would Otherwise Claim that Voluntary Intoxication Prevented Him From Forming the Requisite Intent.

State legislatures are afforded wide latitude in determining the type of behavior that they choose to punish as "criminal." See *Powell* v. *Texas*, 392 U.S. 514, 535-36 (1968). At the core of this autonomy is the States' responsibility for the underlying value judgment "to determine the extent to which moral culpability should be a prerequisite to conviction of a crime." *Id.* at 545 (Black, J., concurring). This legislative discretion includes deciding whether and to what extent various mental states such as "knowledge" or "purpose" should be included as elements of a particular crime. See *Lambert* v. *California*, 355 U.S. 225, 228 (1957) ("There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition."); *Chicago, B. & Q. Ry. Co.* v. *United States*, 220 U.S. 559, 578 (1911) ("The power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned.").

This Court, therefore, has found constitutional various laws that hold people accountable for harmful conduct, regardless of their actual intent. See, *e.g.*, *United States* v.

Park, 421 U.S. 658 (1975); *United States* v. *Dotterweich*, 320 U.S. 277 (1943).[1] Indeed, the Court has emphasized that it "has never articulated a general constitutional doctrine of mens rea." *Powell*, 392 U.S. at 535; see also *Lambert*, 355 U.S. at 228 ("We do not go with Blackstone in saying that 'a vicious will' is necessary to constitute a crime * * *, for conduct alone without regard to the intent of the doer is often sufficient.").

The Montana statute under review falls well within the boundaries of state legislative discretion to define criminal culpability for injurious conduct. Section 45-2-203 provides that "an intoxicated condition * * * may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when" it was ingested. When applied to § 45-5-102(1), the homicide statute under which Respondent was convicted, § 45-2-203 makes evidence of intoxication irrelevant in determining whether a defendant purposefully or knowingly caused the death of another human being.

The Montana Supreme Court held that, by so doing, § 45-2-203 ran afoul of the Due Process Clause, as it lessened the State's burden in establishing a mental element of the crime. See Pet. App. 16a. That conclusion, however, rested on a misunderstanding of the principles that this Court has established, which did not require the state court to view the statute as unconstitutionally relieving the prosecution of proving every element of a crime beyond a reasonable doubt.

Contrary to the state court's conclusion, § 45-2-203 — unlike the Maine statute held unconstitutional in *Mullaney* v.

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[1] Strict liability for certain crimes has wide antecedents in Anglo-American law. See, *e.g.*, *Regina* v. *Prince*, 2 L.R.-Cr. Cas. Res. 154 (1875) (taking girl under age of consent); *White* v. *State*, 185 N.E. 64 (Ohio 1933) (abandoning pregnant wife).

Wilbur, 421 U.S. 684 (1975) — does not lessen the State's burden to prove every element of a deliberate homicide beyond a reasonable doubt. Montana must still present evidence from which a reasonable factfinder could conclude beyond a reasonable doubt that, among other things the accused "purposely or knowingly cause[d] the death of another human being." "No further facts are either presumed or inferred in order to constitute the crime." *Patterson* v. *New York*, 432 U.S. 197, 205-06 (1977).

Rather than altering the State's burden of proof as to an essential element of the crime, § 45-2-203 effectively *amends* the mens rea element of the crime of deliberate homicide to preclude the *effects* of voluntary intoxication from negating mens rea. The State court apparently — but erroneously — viewed this Court's precedents on the burden of proof as foreclosing the legislature from declaring, as Montana has done, that murder consists of either killing another person with actual "knowledge" or "purpose" *or* causing death under circumstances that would otherwise establish knowledge or purpose "but for" voluntary intoxication. The Due Process Clause, however, allows a State to restructure the substantive elements of a crime in this way.

B. Section 45-2-203 Has Substantial Historical Roots and Contemporary Acceptance.

This Court has repeatedly referred to history and the current practice of the States as important guideposts in discerning due process' requirement of fundamental fairness and rationality. See *Schad* v. *Arizona*, 501 U.S. 624, 640 (1991) (plurality); *id.* at 650 (Scalia, J., concurring in part and concurring in the judgment). Section 45-2-203 finds acceptance in both our legal past and present.

1. The development of mens rea in the criminal law.

Holding people accountable for the consequences of their conduct is nothing remarkable or new in the history of our law. In Anglo-Saxon law, people were held responsible, regardless of intent, for any act that hurt another — thus, it was said, "[a] man *acts* at his peril." 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 51-53 (1982). The law focused primarily on compensating (and providing vengeance to) the injured to avert a blood feud. Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 975 (1932). Primitive English law, therefore, "started from a basis bordering on absolute liability." *Id.* at 977.

In the twelfth and thirteen centuries, increased influence of the ecclesiastical courts and renewed interest in Roman law combined to elevate the importance of mens rea in English criminal law. *Id.* at 977, 982-84. "The canonists had long insisted that the mental element was the real criterion of guilt and under their influence the conception of subjective blameworthiness as the foundation of legal guilt was making itself strongly felt." *Id.* at 980. Around the same time, legal scholars, such as Bracton, showed renewed interest in Roman law, which emphasized notions of moral fault. *Id.* at 982-83; *see* M. RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 243 (1936). By the time of Henry II, therefore, the king's courts found it important to inquire whether an accused had a "mens rea," or guilty intention, in determining whether a crime had been committed. RADIN, *supra*, at 242-43; 8 HOLDSWORTH, *supra*, at 433-38.

In its early form, the concept of mens rea was exceedingly vague, requiring only a general sense of moral blameworthiness. Sayre, *supra*, 45 Harv. L. Rev. at 994. Over time, however, courts refined the mental element required for each felony, see *ibid.*, and grouped the elements into broader categories, referred to as crimes of "general" and "specific" intent.

As the concept of moral blameworthiness grew in importance in the English criminal law, courts for the first time were forced to grapple with instances in which harm was caused by a person with a diminished mental capacity. As it seemed inequitable in some circumstances to punish a person for a result that, through no fault of his own, he could not, or did not, intend, the common law began to recognize several exculpatory concepts, including infancy, insanity, compulsion, and coercion. See Sayre, *supra*, 45 Harv. L. Rev. at 989, 1004-13. Significantly, however, the law did not recognize voluntary intoxication as even a possible excuse for criminal conduct until much later.

2. The development of the use of evidence of voluntary intoxication to mitigate punishment of inebriated offenders.

"The early common law apparently made no concession whatever because of intoxication, however gross * * *." Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045, 1046 (1944); see IV W. BLACKSTONE, COMMENTARIES 26; Singh, *History of the Defense of Drunkenness in English Common Law*, 49 L.Q. Rev. 528, 535 (1933). Several reasons were advanced in support of holding the voluntarily intoxicated responsible for their actions. Some commentators and courts reasoned that an inebriant should not be held less culpable because his "'ignorance was occasioned by his own act and folly.'" *State* v. *Stasio*, 396 A.2d 1129, 1135 (N.J. 1979) (quoting *Reniger* v. *Fogossa*, 75 Eng. Rep. 1, 31 (K.B. 1551)); see Singh, *supra*, 49 L.Q. Rev. at 530 (quoting LORD BACON, ELEMENTS OF THE COMMON LAWS OF ENGLAND 29 (1636 ed.)). Others reasoned that the "disability" was easy "to counterfeit." See Hall, *supra*, 57 Harv. L. Rev. at 1047 (citing 1 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 32 (1796)). Still others feared the potential harm to society that would occur if drunks could avoid responsibility for their conduct: "There could rarely be a conviction for homicide if

drunkenness avoided responsibility." See *ibid.* (quoting 1 F. WHARTON, CRIMINAL LAW 95 (1932)).

The prevailing wisdom of the day as of the time our Constitution was adopted was that voluntary intoxication actually "aggravated" the underlying crime. As Justice Story noted:

> "Drunkenness is a gross vice, and, in the contemplation of some of our laws is a crime; and I learned in my earlier studies, that so far from its being in law an excuse for murder, it is rather an aggravation of its malignity." *United States* v. *Cornell*, 25 Fed. Cas. No. 14,868 (C.C.D.R.I. 1820).[2]

This view was apparently based on the Aristotlean notion that "two antisocial acts were committed: getting drunk and causing the harm to others." Paulsen, *Intoxication as a Defense to Crime*, 1961 Ill. L.F. 1, 9 (citing Aristotle, *Ethics*, bk. III, chap. 5, 1113b, 31); see *State* v. *Tatro*, 50 Vt. 481, 490 (1878). Although it is unclear whether any sentences were actually enhanced because an accused was drunk, see 14 Am. Dig. § 66 (citing cases), it is clear that, until the nineteenth century, the law of criminal responsibility of inebriates remained consistent: courts did not permit juries to consider evidence of voluntary intoxication in determining a defendant's criminal intent.

The case of *Rex* v. *Grindley*, decided by Justice Holroyd in 1819, marked a sea change in the law of voluntary

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[2] See also IV W. BLACKSTONE, COMMENTARIES 25-26 ("[A]s to artificial, voluntarily contracted madness, by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary phrenzy; our law looks upon this as an aggravation of the offense, rather than as an excuse for any criminal misbehavior."); Singh, *supra*, 49 L.Q. Rev. at 531 (listing Coke, Chitty, and Russell as proponents of this rule).

intoxication. See Hall, *supra*, 57 Harv. L. Rev. at 1048 (discussing case). In that case, it was suggested for the first time that whether a defendant was drunk was a material fact in determining premeditation. *Ibid.*; 8 HOLDSWORTH, *supra*, at 442. Sixteen years later, in *Rex* v. *Carroll*, 173 Eng. Rep. 64, 65 (N.P. 1835), Justice Park repudiated Justice Holroyd's statement of law and claimed that Justice Holroyd himself had retracted his position, Hall, *supra*, 57 Harv. L. Rev. at 1048; 8 HOLDSWORTH, *supra*, at 442 n.8, but the seed had already been planted.

By the middle to the latter half of the nineteenth century, Justice Holroyd's idea was apparently taking root in some quarters, albeit slowly. Hall, *supra*, 57 Harv. L. Rev. at 1049; 8 HOLDSWORTH, *supra*, at 442-43. Many courts thought the rule logical when applied to a defendant who was accused of a crime of specific intent or premeditation. If a defendant was grossly intoxicated, courts reasoned, how could he form the requisite specific intent, or plot murder? Moreover, courts had been troubled by the supposedly harsh results that followed from excluding evidence of voluntary intoxication: the law punished equally those who killed by design and those who killed while in a drunken stupor. Permitting evidence of voluntary intoxication to rebut premeditation or specific intent to commit a crime allowed courts to convict defendants of crimes requiring only general intent, for which, especially in the case of homicide, the penalties were less severe. See Hall, *supra*, 57 Harv. L. Rev. at 1050-51; W.R. LEFAVE & A.W. SCOTT, JR., CRIMINAL LAW § 4.10, at 391 (2d ed. 1986). This distinction often spelled the difference between a capital offense and one with less drastic punishment. Thus, permitting evidence of voluntary intoxication to negate a defendant's specific intent to commit a crime provided courts with an avenue to allow the "long-desired mitigation of punishment of grossly inebriated homicides." Hall, *supra*, 57 Harv. L. Rev. at 1049.

As of July 1868, when the 14th Amendment was ratified, the various states took many different approaches to the relevance of evidence of voluntary intoxication. Some States still adhered to the common law approach.[3] Others, such as Texas, limited consideration of evidence of involuntary intoxication to the sentencing phase.[4]

The trend emerging in the majority of the States, though, was to allow juries to consider evidence of voluntary intoxication when considering whether a defendant acted with premeditation or with the specific intent to commit a particular crime. Thus, by 1878 it could be said that, as a matter of policy shifts, "the great weight of recent American decisions is to the effect that intoxication may be considered as a factor in determining whether the accused was capable of forming a specific intent, when the intent is of the essence of the crime charged."[5] Even while permitting the accused to offer such evidence to negate the mens rea needed for a specific intent crime, however, courts uniformly continued to recite the common law mantra that "voluntary drunkenness

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[3] See 14 Am. Dig. § 67, at 678-82 (citing cases); see, *e.g.*, *Harris* v. *United States*, 8 App. D.C. 20, 29 (1896); *McDaniel* v. *State*, 356 So. 2d 1151, 1158 (Miss. 1978) (noting that rule remained in effect until 1932); *State* v. *Harlow*, 21 Mo. 446, 458 (1855); *People* v. *Rogers*, 18 N.Y. 2, 9 (1858) (stating that it "is not law" that jury should be instructed to consider intoxication of defendant in determining intent with which homicide was committed); *People* v. *Register*, 457 N.E.2d 704, 709 (N.Y. 1983) (noting that, in 1881, New York modified rule by statute), cert. denied, 466 U.S. 953 (1984); *State* v. *McCants*, 1 Speers 384, 392-95 (S.C. 1842); *State* v. *Tatro*, 50 Vt. 481, 491 (1878).

[4] See, *e.g.*, *Houston* v. *State*, 14 S.W. 352 (Tex. App. 1883); see also 14 Am. Dig. § 65, at 677-78 (citing cases).

[5] Note, *Intoxication as a Defense to Crime — Degrees of Crime*, 50 Vt. 493, 493 (1878).

neither excuses nor justifies crime." 14 Am. Dig. § 65, at 675-78 (citing numerous cases). The rule therefore operated primarily to mitigate the sentence — but not negate the culpability — of those who committed crimes while voluntarily intoxicated.

> "It is only within the fairly modern times, with the growing realization that criminal liability is to be sharply differentiated from moral delinquency, that intoxication has been allowed as an indirect defense in so far as it negatives the existence of a specific intent required for certain crimes." Sayre, *supra*, 49 L.Q. Rev. at 1015.

It remains the majority rule in America today that voluntary intoxication mitigates but does not negate criminal responsibility. But some States, including Missouri,[6] South Carolina,[7] and Virginia,[8] have decided to retain the common law approach that prevailed before the latter half of the nineteenth century, denying any mitigating effect at all to voluntary intoxication. As illustrated by the case now before the Court, other States, including Montana, Hawaii,[9] Mississippi,[10] New Jersey,[11] and Pennsylvania,[12] recently

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[6] *State* v. *Richardson*, 495 S.W.2d 435 (Mo. 1973) (en banc).

[7] *State* v. *Vaughn*, 232 S.E.2d 328 (S.C. 1977).

[8] See *Chittum* v. *Commonwealth*, 174 S.E.2d 779 (Va. 1970) (evidence of voluntary intoxication inadmissible to negate element of specific intent of the offense; evidence is admissible to rebut deliberation or intent in murder charge).

[9] See *State* v. *Souza*, 813 P.2d 1384 (Haw. 1991).

[10] See *McDaniel* v. *State*, 356 So. 2d 1151 (Miss. 1978).

[11] See *State* v. *Stasio*, 396 A.2d 1129 (N.J. 1979).

have decided to restore the no-mitigation rule, either in whole or in part.

C. The Willingness of Some States to Treat Voluntary Intoxication as a Legitimate Basis for Rebutting Mens Rea in Crimes of Specific Intent Represents Transient Notions of Public Policy, Not Fundamental Tenets of the Criminal Law Required by the Due Process Clause.

The decision by many States to view voluntary intoxication as a permissible basis for negating mens rea in specific-intent crimes is a creature of policy, which evolved during the nineteenth century in some states to mitigate the perceived harshness of sentences that the common law rule otherwise would have imposed on inebriated offenders. Adoption of this principle reflected changing societal perceptions regarding the criminality and immorality of alcohol use, which softened somewhat in the nineteenth century as compared to the early English law. Courts and legislatures were able to effect this policy primarily through the common law's legal fiction of general and specific intent crimes.[13]

That the doctrine is more akin to a sentencing scheme than a fundamental concept relevant to a defendant's guilt or innocence can be discerned by considering its logic and effect. Professor Hall has written, in particular, about the

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[12] Cf. *Commonwealth* v. *Rumsey*, 454 A.2d 1121 (Pa. Super. Ct. 1983) (evidence of voluntary intoxication inadmissible to negate element of intent, except when relevant to reduce murder from higher to lower degree).

[13] The distinction between "specific" and "general" intent is a legal fiction, not psychological fact; "the paramount fact is that neither common experience nor psychology knows any such actual phenomenon as 'general intent' that is distinguishable from 'specific intent.'" Hall, *supra*, 57 Harv. L. Rev. at 1064.

lack of logical consistency in the application of this rule in cases involving homicide. See generally Hall, *supra*, 57 Harv. L. Rev. at 1048-54; see also Note, *Alcohol Abuse and the Law*, 94 Harv. L. Rev. 1660, 1681-82 (1981).

In a majority of the States where the severity of murder is defined in degrees, for example, the successful invocation of the doctrine results in conviction for second degree murder, a general intent crime. The defendant cannot be convicted of first degree murder (a crime requiring proof of "specific intent" or premeditation), if the defendant was too intoxicated to form the requisite intent. The result is different in cases where the issue is whether voluntary intoxication reduces a charge of second degree murder to voluntary manslaughter (which could typically be accomplished by establishing that the killing was in response to a legal provocation), even though this ignores "the admitted fact that drunken persons are more easily aroused and lose self-control more readily than do sober ones." Hall, *supra*, 57 Harv. L. Rev. at 1052.[14] As this illustration makes clear, the rule allowing a jury to consider voluntary intoxication in prosecutions for specific-intent crimes — but only in such crimes — is a device used to achieve a certain policy objective: to try to calibrate punishment consistently with a particular view of the relative moral culpability of a person who commits homicide while voluntarily intoxicated.

In *State* v. *Stasio*, 396 A.2d at 1132-36, the New Jersey Supreme Court relied in part on the artificiality of the specific/general intent distinction in deciding to treat voluntary intoxication as irrelevant to the issue of a defendant's purpose or knowledge. The court reasoned that dogmatic adherence to the artificial and strict distinctions between general and specific intent crimes "undermines the criminal law's primary function of protecting society from the

[14] See LEFAVE & SCOTT, *supra*, § 7.4(b), at 621 & n.34.

results of behavior that endangers the public safety." *Id.* at 1134. The court explained that the protection of society

> "should be our guide rather than concern with logical consistency in terms of any single theory of culpability, particularly in view of the fact that alcohol is significantly involved in a substantial number of offenses. The demands of public safety and the harm done are identical irrespective of the offender's reduced ability to restrain himself due to his drinking." *Ibid.*

Further proof that the relevance of voluntary intoxication to criminal culpability involves solely a policy choice appears in the commentary accompanying the discussion of culpability based on recklessness in the Model Penal Code ("MPC"). The drafters of the MPC conceded that intoxication could be logically relevant to disproving awareness of risk, which is the yardstick against which recklessness is measured. MODEL PENAL CODE § 2.08 commentary at 8-9 (Tentative Draft No. 9, 1959). They nonetheless recommended that evidence of this condition be excluded from consideration in crimes requiring only a showing of recklessness, noting several strong policy considerations that demand this result despite the arguable relevance of intoxication to the underlying element of guilt.

In light of its history and illogic, the rule that permitted defendants to show self-induced intoxication to negate intent in specific intent crimes is not a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson* v. *New York*, 432 U.S. 197, 202 (1977). Indeed, as the drafters of the MPC reasoned in analogous circumstances, the rule is nothing more than "a special rule of liability" derived from competing policy concerns.[15] As such, it is precisely the type of tool

[15] MODEL PENAL CODE, *supra*, § 2.08 commentary at 9; see

that this Court has recognized that States may use to "adjust[ ] * * * the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man." *Powell*, 392 U.S. at 536.

D. Section 45-2-203 is Rational and Fair.

The rule established by § 45-2-203 is rational and fair and, therefore, is a sensible option for State legislatures seeking to cope with the continuing problem of crimes committed by the voluntarily intoxicated.

1. Section 45-2-203 promotes important and legitimate objectives and is consistent with the primary aims of the criminal law.

The criminal law serves many purposes, including the prevention of antisocial conduct, the enhancement of a sense of security throughout society, and the rehabilitation of offenders. See generally Hart, *The Aims of the Criminal Law*, 23 L. & Contemp. Probs. 401, 401 (1958). These important goals are fostered by § 45-2-203.

By holding individuals responsible for the consequences of their conduct while intoxicated, § 45-2-203 discourages two types of antisocial and potentially dangerous behavior: drinking to excess, and injuring others while grossly intoxicated. The provision also promotes public safety by reducing through deterrence or incarceration the number of people who might cause harm because they voluntarily diminish their capacity to appreciate or control their behavior.

Hall, *supra*, 57 Harv. L. Rev. at 1054 (noting that the concept of a "general intent" crime in this context merely reflects a legal fiction designed to accommodate a policy judgment distinguishing the moral culpability of a drunken homicide from that of a sober person effecting a like injury, while at the same time insisting that a person who voluntarily indulges in alcohol should not escape all criminal culpability for causing injury while intoxicated).

Although it certainly is not the case that all those who ingest intoxicants are likely to commit a violent crime, it is equally certain that many do, as a large number of violent crimes are committed by those who are intoxicated. Studies suggest that alcohol consumption is associated with 62% of aggravated assaults, and half of all spouse abuse, reported rapes, and homicides.[16] By holding the voluntarily intoxicated criminally responsible for their actions, § 45-2-203 operates to remove from society potentially dangerous persons who have demonstrated that they are either unable or unwilling to conform their behavior when they are intoxicated. As one trial judge put it, "[m]any people get drunk but when honest people get drunk they do not go out and commit crimes" (quoted in *Heideman* v. *United States*, 259 F.2d 943, 948 n.4 (D.C. Cir. 1958) (Bazelon, J., dissenting), cert. denied, 359 U.S. 959 (1959)). The "isolation of the dangerous has always been considered an important function of the criminal law." *Powell*, 392 U.S. at 539 (Black, J. concurring).

The Montana provision also promotes respect for the law, another legitimate goal of the criminal justice system, by preventing miscreants from receiving a benefit because of another misdeed. As Justice Story put it when responding to the argument that evidence of voluntary intoxication ought to be admitted to rebut intent to murder, "[t]his is the first time, that I ever remember it to have been contended, that the commission of one crime was an excuse for another." *United*

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[16] See National Institute on Alcoholism and Alcohol Abuse, Report to Congress (1983); National Institute on Alcoholism and Alcohol Abuse, Sixth Report to Congress (1987); Office of Substance Abuse Prevention, Prevention Plus II: Tools for Creating and Sustaining Drug-Free Communities (1989); see also Note, *supra*, 94 Harv. L. Rev. at 1681-82 ("About half of homicide perpetrators and victims are to some extent under the influence of alcohol at the time of the incident.").

States v. *Cornell*, 25 Fed. Cas. No. 14,868 (C.C.D.R.I. 1820).[17]

Section 45-2-203 thus is good for society in general and, in a profound penological way, for the accused in particular, since it teaches them that they must become responsible for their acts. Professor Henry Hart has explained:

> "Man learns wisdom in choosing by being confronted with choices and by being made aware that he must abide the consequences of his choice * * *. [I]t is the criminal law which defines the minimum conditions of man's responsibility to his fellows and holds him to that responsibility. The assertion of social responsibility has value in the treatment even of those who have become criminals." Hart, *supra*, 23 L. & Contemp. Probs. at 410.

2. Section 45-2-203 is not fundamentally unfair to defendants.

a. Fair Notice of Culpability. There is nothing fundamentally unfair about holding people criminally liable for the harm they caused while in a drunken stupor. A person in Respondent's position cannot seriously contend that he lacked notice that his conduct was criminally culpable. The Montana statute that Respondent challenges expressly warned that he would face full criminal responsibility if he drank himself into a stupor and killed someone.

[17] See also *Harris* v. *United States*, 8 App. D.C. 20, 26 (1896) ("[I]t would be subversive of all law and of all morality if the commission of one vice or crime could be permitted to operate as an excuse or palliation for another crime."); *State* v. *Harlow*, 21 Mo. 446, 458 (1855) (opining that "it is considered criminal for a man to make himself a drunkard; one crime never yet justified the commission of another").

This sensible declaration of what society expects from its members is hardly a local aberration. At common law, for example, evidence of voluntary intoxication was irrelevant in determining whether an accused was guilty of a "depraved heart" murder, see LEFAVE & SCOTT, *supra*, § 4.10(b), at 391, or killed in self-defense, see *id.* § 4.10(d), at 393. This was true even though gross intoxication may have been a significant factor contributing to the defendant's extremely reckless conduct or to the defendant's inability to discern the true nature of a threat he faced and to devise a more measured response. Thus, if a person got drunk and killed someone in a fit of extreme recklessness, the law would punish the inebriated offender no differently from a sober person who did the same thing. Reflecting the same public policy, the law of torts, which also rests on notions of personal fault, does not relieve a person of liability because he or she harmed others or their property while voluntarily intoxicated.[18]

b. Ample Notice of Societal Risk. Moreover, for generations the general public has been aware that intoxication and criminal misconduct often go hand in hand. In 1959, for example, the drafters of the MPC noted that the public awareness of the potential consequences of excessive drinking on a person's ability to gauge risk is "dispersed in our culture," and thus, the drafters reasoned, it would not be unfair to disregard evidence of involuntary intoxication when

[18] 3 F.V. HARPER, F. JAMES & O.S. GRAY, THE LAW OF TORTS § 16.7, at 426 (2d ed. 1986) (noting that "voluntary intoxication is generally said to be no excuse for acts or omissions that fail to conform to the conduct of a reasonable and sober person."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 178 (5th ed. 1984) (stating that it is "uniformly held" that voluntary intoxication "cannot serve as an excuse for acts done in that condition which would otherwise be negligent").

determining whether a defendant was guilty of reckless homicide.[19] More recently, many States' highly publicized drunk-driving campaigns have reminded citizens that stiff penalties are imposed for dangerous, drunken conduct.

c. Adequacy of Personal Fault. One who kills while voluntarily intoxicated cannot be heard to complain that he is blameless and thus undeserving of condemnation or punishment. To begin with, "[p]ublic drunkenness has been a crime throughout our history, and even before our history it was explicitly proscribed by a 1606 statute, 4 Jac. 1, c.5. It is today an offense in every State in the Union." *Powell*, 392 U.S. at 538 (Black, J. concurring). Our society has consistently recognized, to varying degrees depending on the prevailing mores of the day, the moral blameworthiness of self-induced intoxication.[20]

Such conduct is culpable in another way; it foreseeably endangers other members of society, not just the substance abuser. As Professor Paulsen has explained: "Through a choice, of the sort normally operative in the law, the inebriate has increased the risk of harm to others by reducing his own capacity for taking dangers into account and for controlling himself." Paulsen, *supra*, 1961 Ill. L.F. at 5. It has been

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[19] MODEL PENAL CODE, *supra*, § 2.08 commentary at 9. More than 40 years ago, another commentator posited that "[w]idespread knowledge as to effects of alcohol suggest that everyone should normally be responsible for the acts he commits." Note, *Intoxication as a Criminal Defense*, 55 Colum. L. Rev. 1210, 1218 & n.58 (1955).

[20] See, *e.g.*, *Harris* v. *United States*, 8 App. D.C. 20, 26 (1896) ("Voluntary intoxication is itself a crime, at least in morals, if not always in law. It is always at least a vice."); *People* v. *Townsend*, 183 N.W. 177, 179 (Mich. 1921) ("Voluntary drunkenness in a public place was always a misdemeanor at common law; and it was always wrong morally and legally. It is malum in se.").

argued, therefore, that it is fair to hold the intoxicated criminally responsible for whatever harm he may cause, as the very act of endangering others by voluntarily diminishing one's capacity to this extent is worthy of societal condemnation.[21] As the New York Court of Appeals explained in an oft-quoted passage:

> "In the forum of conscience there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect, and the reckless taking of life by one infuriated by intoxication; but human laws are based upon considerations of policy; and look rather to the maintenance of personal security and social order, than to any accurate discrimination as to moral qualities of individual conduct." *People* v. *Rogers*, 18 N.Y. 9, 18 (1858).

The Court concluded, therefore, that

> "there is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which every one owes to his fellowmen and to society, to say nothing of more solemn obligations, to preserve, so far as it lies in his power, the inestimable gift of reason. * * *. [I]f by a voluntary act he temporarily casts off the restraints of reason and conscience, no wrong is done him if he considered answerable for any

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[21] See 3 F.V. HARPER, F. JAMES & O.S. GRAY, *supra*, § 16.7, at 426 n.14 (noting that a feeling of "moral condemnation" is justified as "the person getting drunk (or stoned) should know that he will thereby subject others to unreasonable risks and is capable of refraining from doing so").

injury which in that state he may do to others or to society." *Ibid.*[22]

The concept of holding a person responsible for one harm because he committed another causally connected "wrong" is not new to the law; indeed, it is the foundation of the doctrines of felony-murder and misdemeanor-manslaughter. The underlying rationale is that an actor's blameworthy conduct in committing a lesser offense is sufficient to import the requisite element of moral blame for the more serious offense. See Hall, *supra*, 57 Harv. L. Rev. at 1067.

This very rationale has been used by some courts to explain why it is not unjust to hold a defendant criminally liable for a homicide, even though the defendant claims that diminished capacity prevented him from forming the requisite men rea: "Intoxication, which is itself a crime against society, combines with the act of killing, and the evil intent to take life which necessarily accompanies it, and all together afford sufficient grounds for implying malice." *State* v. *Johnson*, 41 Conn. 584, 588 (1874); see *State* v. *Stasio*, 396 A.2d 1129, 1131 (N.J. 1979).[23]

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[22] Accord *Harris*, 8 App. D.C. at 28-29; see *Roberts* v. *People*, 19 Mich. 408, 418 (1870) ("He must be held to have purposefully blinded his moral perceptions, and set his will free from the control of reason — to have suppressed the guards and invited the mutiny; and should therefore be held responsible as well for the vicious excesses of the will, thus set free, as for the acts done by its prompting."); *State* v. *Stasio*, 396 A.2d 1129, 1134 (N.J. 1979) ("'[I]f a person casts off the restraints of reason and consciousness by a voluntary act, no wrong is done to him if he is held accountable for any crime which he may commit in that condition. Society is entitled to this protection.'" (quoting *McDaniel* v. *State*, 356 So. 2d 1151, 1160-61 (Miss. 1978)).

[23] A similar rationale is found in tort law: "Sometimes it is said that the negligence consists of getting drunk." 3 HARPER, JAMES & GRAY, *supra*, § 16.7, at 426 n.14; see KEETON ET AL., *supra*, § 32, at 178 ("[D]runkenness is so antisocial that one who indulges in it ought to be held to the consequences").

As the preceding discussion makes clear, this is not a case where the issue is *whether* a defendant's conduct is worthy of condemnation — it clearly is. The accused's alleged mental incapacity resulted from his own culpable conduct, rather than from factors outside his control, unlike the defendant in *Robinson* v. *California*, 370 U.S. 660 (1962). Professor Paulsen has explained the crucial difference:

> "There is a great difference between the insane and the intoxicated. If we put aside cases of insane compulsions to drink (assuming that such cases exist), there is some choice about drinking even in the case of the thirsty. Any choice carries with it responsibility and the particular choice to drink alcohol increases the risk of harm to others." Paulsen, *supra*, 1961 Ill. L.F. at 4.

Nor does this case involve a statute like the one in *Lambert* v. *California*, 355 U.S. 225 (1957), which was found unconstitutional because it punished wholly passive and innocent conduct. Rather, the effect of § 45-2-203 and § 45-5-102(1), taken together, is simply to hold a person responsible for engaging in affirmative acts that endangered society at large and, in this case, snuffed out two human lives. There can be little doubt that this kind of conduct is properly viewed as "blameworthy in the average member of the community." See O. HOLMES, THE COMMON LAW 49-50 (1881).

3. It is not cruel or unusual punishment to hold a defendant responsible for deliberate homicide when he killed while voluntarily intoxicated.

Although not squarely placed in issue by the ruling of the court below, the Eighth Amendment also stands as no obstacle to enforcing Montana's policy. The argument would be that the person who kills while intoxicated is less morally culpable than the person who kills while sober, and thus as a constitutional matter may not be treated in the same way in the eyes of the criminal law. But the Eighth Amendment "does not affect the state's definition of any substantive offense, even a capital offense." *Walton* v. *Arizona*, 497 U.S. 639, 649 (1989). Moreover, the Court has already rejected the argument that the Eighth Amendment — outside the capital punishment context — imposes some theory of "proportionality" on legislative classifications of crimes and punishments or requires "individualized" punishments. *Harmelin* v. *Michigan*, 501 U.S. 957, 995 (1991).

Thus, no provision of the United States Constitution prevents a State from reducing the level of culpability considered sufficient to hold an actor criminally liable for a deliberate homicide. At bottom, the extent to which blameworthy conduct should be punished, short of the death penalty, is a matter of legislative discretion. By leaving such decisions to that political branch, society as a whole can respond to changing mores and advances in the understanding of the human condition. This case provides a good example of the benefits of that flexibility, as it highlights how the criminal law has responded over time to changing societal perceptions of the culpability of those who choose to drink to excess and then injure others. Legislatures should be permitted to continue to do so.

II. THE DUE PROCESS CLAUSE DOES NOT RESTRICT A STATE LEGISLATURE'S AUTHORITY TO PREVENT A JURY FROM CONSIDERING EVIDENCE OF VOLUNTARY INTOXICATION WHEN DETERMINING THE EXISTENCE OF A MENTAL STATE THAT IS AN ELEMENT OF A CRIMINAL OFFENSE.

Even if § 45-2-203 is viewed as a purely evidentiary rule, instead of as a substantive modification to Montana's criminal law, it comports with due process. The argument that evidence of intoxication may be "relevant" to the mental element of a crime does not mean that a State must allow the accused to tender the evidence.

It is well established, for example, that "[t]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor* v. *Illinois*, 484 U.S. 400, 410 (1988). The accused's right to present relevant evidence may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. See *Rock* v. *Arkansas*, 483 U.S. 44, 55 (1987); *Ohio* v. *Roberts*, 448 U.S. 56, 64 (recognizing a state's "strong interest" in the development and precise formulation of the rules of evidence applicable in criminal proceedings). Examples include the hearsay rule, the attorney-client privilege, the work product doctrine, the priest-penitent privilege, and the doctor-patient privilege, all of which presuppose that the excludable evidence is otherwise "relevant" to a material issue in the prosecution.

A State, of course, may not apply a rule of evidence that *arbitrarily* excludes relevant evidence, see *Rock*, 483 U.S. at 55 (emphasis added); *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973), but a State's decision regarding the procedures under which its laws are carried out "is not subject to proscription under the Due Process Clause unless it 'offends some principle of justice so rooted in the traditions and

conscience of our people as to be ranked as fundamental.'" *Patterson* v. *New York*, 432 U.S. 197, 201-02 (1977) (quotation omitted). It is hardly offensive to any fundamental principle of our system of justice for a State legislature to ban evidence of voluntary intoxication in determining the existence of a mental state that is an element of the offense.

In prescribing a rule of evidence, Montana has more than adequate reasons for deciding not to allow the use of one form of misconduct to undermine otherwise sufficient proof of crime. At the outset, it is not clear that evidence of intoxication is particularly relevant to a factfinder's determination whether an accused committed a crime with the requisite knowledge, purpose or intent. As then-Judge Burger noted, "[d]runkenness, while efficient to reduce or remove *inhibitions*, does not readily negative *intent*." *Heideman* v. *United States*, 259 F.2d 943, 946 (D.C. Cir. 1958), cert. denied, 359 U.S. 959 (1959).[24]

Even if such evidence is marginally relevant to the mental element, it is also unclear whether, as a practical matter, it is actually helpful to the factfinder. It is "extremely difficult" to determine the instant at which a defendant actually lost control of his ability to reason. See MODEL PENAL CODE, *supra*, § 2.08 commentary at 9. Objective measurements of intoxication, such as blood alcohol content, are to little avail, as intoxicating substances affect people differently. For many of these same reasons, some commentators have contended that permitting evidence of voluntary intoxication to negate mens rea "presents an opportunity for spurious claims." Note, *supra*, at 1218 &

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[24] See Hall, *supra*, 57 Harv. L. Rev. at 1065 (noting that a grossly intoxicated person commits very harm he intends, "typically what is lacking is control and ethical sensitivity"); G. WILLIAMS, CRIMINAL LAW, § 182, at 559 (2d ed. 1961) (noting that "alcohol remove[s] inhibition or self-restraint, and impair[s] the appreciation of the consequences of conduct").

n.58; see IV W. Blackstone, COMMENTARIES 26 (noting "how easy it is to counterfeit this excuse"); MODEL PENAL CODE, *supra*, § 2.08 commentary at 9 (noting the relative rarity of cases where intoxication really does engender unawareness as distinguished from imprudence); W. PAGE KEETON ET AL., *supra*, § 32, at 178 (noting that "an excuse based on intoxication would be far too common and too easy to assert").

In light of the evidence's questionable relevance, its limited helpfulness, and the potential for its fraudulent use, its exclusion may actually promote a primary goal of the criminal justice system — accurate factfinding. Similar considerations justify excluding evidence under Rule 403 of the Federal Rules of Evidence, which provides that relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of * * * confusion of the issues, or misleading the jury." A state legislature should have no less discretion on such policy-laden and empirically questionable matters than the Federal Rules entrust to individual trial judges.

Several other important objectives are fostered by excluding such evidence. If evidence of self-induced intoxication is inadmissible to negate intent, then persons will be held accountable for their conduct while intoxicated, which, in turn, tends to deter self-induced intoxication. Deterring undesirable conduct is at the heart of the criminal justice system. See Hart, *supra*, 23 L. & Contemp. Probs. at 401.

Perhaps most important, this kind of exclusionary rule promotes respect for the law. It would be a perverse twist of justice to conclude that the Due Process Clause requires the States to let killers use evidence of one kind of antisocial conduct in order to excuse another injurious act. See IV W. Blackstone, COMMENTARIES 26; *United States* v. *Drew*, 25 Fed. Cas. No. 14,993 (C.C.D. Mass. 1828) (Story, J.).

Finally, as we have already discussed, history and logic belie any contention that the opportunity to use evidence of voluntary intoxication to negate mens rea is a fundamental principle of justice. The willingness to allow this use, even in limited circumstances of "specific intent" crimes, is of relatively recent vintage, and it never achieved universal acceptance. It reflects just one perspective on appropriate sentencing policy, a policy calculated to punish one type of morally blameworthy conduct — crimes committed by the intoxicated — less severely than similar, morally blameworthy conduct when committed by the sober.

States such as Montana, however, surely retain the flexibility to use the laws of evidence to manifest a different public policy; one that does not permit a person who has caused a fatal injury to invoke his own voluntary intoxication to evade responsibility for his misdeed.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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